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Implementing the USA Patriot Act: A Case Study of the Student and Exchange Visitor Information System (SEVIS)

Kam C. Wong

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IMPLEMENTING THE USA PATRIOT ACT:
A CASE STUDY OF THE STUDENT AND EXCHANGE VISITOR
INFORMATION SYSTEM (SEVIS)

*Kam C. Wong, J.D., Ph.D. **

“I must say in all candor that we wish we could have been spared the SEVIS experience”¹

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1. Ltr. from Marlene M. Johnson, Exec. Dir. and CEO, NAFSA, to The Honorable Tom Ridge, Sec. of Homeland Sec. *NAFSA Response to Department of Homeland (DHS) Security SEVIS Updates* [¶ 1] (2004) (available at http://www.nafsa.org/public_policy.sec/international_student_1/iss_archive/nafsa_response_to_department_2).

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I. INTRODUCTION

On September 11, 2001 (9/11), terrorists attacked the United States without warning, killing 2,749 people in New York City.² The following day President Bush declared war on terrorism, pledging, “The United States of America will use all our resources to conquer this enemy.”³

After the September 11 attacks, it was discovered that two of the terrorist pilots, Mohamed Atta and Marwan Alshehhi, were trained to fly at Huffman Aviation International in Venice, Florida, in September of 2000. Both of these men entered the country on a visitor’s visa. Their applications for a change of visa status from “visitor” to that of “vocational student” were processed by the Immigration and Naturalization Service (INS).⁴ Another September 11 terrorist pilot, Hani Hanjour entered the United States on October 9, 2000 on an F-1 student visa to study English at an English as a Second Language (ESL) Center in Oakland, California. Hanjour never attended and was not reported

2. Voices of September 11th, *Final WTC Death Toll Said Down to 2,749*, http://www.voicesofsept11.org/medical_examiner/012304.html (Jan. 23, 2004).

3. George W. Bush, *Remarks By The President In Photo Opportunity With The National Security Team*, <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html> (accessed Jan. 21, 2006).

4. *The Immigration and Naturalization Service’s Contacts with Two September 11 Terrorists: A Review of the INS’s Admissions of Mohamed Atta and Marwan Alshehhi, its Processing of Their Change of Status Applications, and its Efforts to Track Foreign Students in the United States*, Off. of the Inspector Gen. Special Rept. 1 (DOJ May 20, 2002) (available at <http://justice.gov/oig/special/0205/fullreport.pdf>) [hereinafter *Immigration and Naturalization Service’s Contacts*].

missing by the school.⁵ Consequently, legitimate questions were raised as to whether the tragedy could have been prevented if the visas obtained by Atta, Alshehhi, and Hanjour had been properly screened and monitored.

September 11 precipitated a renewed call for stricter monitoring of foreign visitors. On this subject, Senator Dianne Feinstein called for a complete overhaul of the foreign student tracking system. In particular, she proposed a six-month moratorium on the issuance of foreign student visas, giving the INS “time to remedy the many problems in the system.”⁶ Specifically, Senator Feinstein wanted to fund, develop, and deploy an electronic foreign students tracking system.⁷

Although Feingold’s proposal was not enacted, Congress subsequently passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) on October 26, 2001⁸ mandating the establishment of the Student and Exchange Visitor Information System (SEVIS)⁹ by January 30, 2003.¹⁰ SEVIS was designed to electronically track and monitor international students in the United States.

The idea of an electronic student tracking system within an open-university community in a democratic society has long generated heated debates and passionate protests. SEVIS only renewed the controversy.¹¹ While schools generally agree that SEVIS is necessary after 9/11, schools are not in agreement with the government as to its initial feasibility and

5. Natl. Rev. Online, *Nonimmigrant Visa Application: Hani Hanjour, 2000(b)*, <http://www.nationalreview.com/document/document100902c.asp> (accessed Nov. 20, 2006); Chitra Ragavan, Chitra Ragavan, *Coming to America: An Already Overburdened Immigration System Faces the New Demands of a Post-9/11 World*, U.S. News & World Report [¶ 11] (Feb. 18, 2002), http://www.usnews.com/usnews/news/articles/020218/archive_020243.htm (other terrorists have also been found to have overstayed their business visas, for example, Nawaf Alhazmi and Satam Al Suqami each overstayed their B-1/B-2 visas).

6. Dianne Feinstein, *Senator Feinstein Urges Major Changes in U.S. Student Visa Program* [¶ 4], <http://feinstein.senate.gov/releases01/stvisas1.htm> (Sept. 27, 2001).

7. *Id.*

8. Pub. L. No. 107-56, 115 Stat. 272 (2001).

9. Patty Croom & Jim Ellis, *A Glossary of SEVIS-Related Terminology 2*, <http://www.educause.edu/ir/library/pdf/EDU0212.pdf> (Sept. 30, 2002).

10. See *Congress Learns INS Unlikely to Meet January SEVIS Deadline*, 51 Higher Educ. and Natl. Affairs 17 (Sept. 23, 2002) [hereinafter *Congress Learns*]; Patty Croom & Kathy Bellows, *Understanding the Student and Exchange Visitor Information System (SEVIS)*, 25 EDUCAUSE Q. 14 (No. 3 2002) (available at <http://www.educause.edu/ir/library/pdf/EQM0232.pdf>).

11. Mary Clarke-Pearson, *Federal Agents Tracking Foreign Students in U.S.: Hundreds of Colleges Have Faced Inquiries from the FBI and INS*, The Daily Pennsylvanian [¶¶ 11, 17] (Nov. 13, 2001) (available at <http://www.dailypennsylvanian.com/media/storage/paper882/news/2001/11/13/News/Federal.Agents.Tracking.Foreign.Students.In.U.s-2159316.shtml>) (Professor Jacques deLisle observed that international law does not require foreign visitors be given the same rights as American citizens. Professor Robert Vitalis considered such targeted investigations of foreigners as discriminatory.).

ultimate utility.¹²

To its proponents, SEVIS is a much needed and long overdue tool for keeping the U.S. borders secure from illegal immigrants and its domestic front safe from terrorists. SEVIS allows the government to track foreign students and international visitors for educational, as well as security reasons, in a real-time, paperless, cost-effective, error-free environment.¹³

To its opponents, the implementation of Sevis is fraught with many unresolved and (some say) un-resolvable, financial, legal, and technical problems. School associations for educators and administrators have expressed major misgivings and grave reservations with the unrealistic implementation of deadlines, unavailable administrative regulations, unreliable agency guidance, unreasonable workload, unfunded legislative mandate, uncertified vocational schools, untested software programs, untrained INS staff, uninformed Help Desk, and unresponsive Department of Homeland Security (DHS) officials, particularly at the Immigration and Customs Enforcement (ICE).¹⁴

A cursory review of literature reveals that there are very few comprehensive and systematic studies of SEVIS-related implementation problems and issues,¹⁵ particularly from the university administration perspective.¹⁶ This article is a first attempt to fill this inexplicable, yet

12. Terry W. Hartle & James R. Burns, *Interconnecting Worlds*, 37 *EDUCAUSE Rev.* 88, 88-89 (Sept./Oct. 2002).

13. Bd. of Regents of the U. of Sys. of Ga. Off. of Intl. Educ., *SEVIS Presentation to GACRAO 5-8*, http://www.georgiaqualityteachers.org/oie/news/archive/SEVIS_102803.pdf (Oct. 28, 2003) (stating that SEVIS allows for centralized, real-time, and up-to-date maintenance of information by university and INS).

14. See NAFSA: Assn. of Intl. Educators, *Summary of SEVIS Conference Call*, NGLU 2004-h (July 14, 2004) (copy on file with Author); *Follow-up Review on the Immigration and Naturalization Service's Efforts to Track Foreign Studentes in the United States through the Student and Exchange Visitor Information System*, DOJ Evaluation & Inspections Rpt., I-2003-003 11 (Mar. 2003) (available at <http://www.usdoj.gov/oig/reports/INS/e0303/final.pdf>) [hereinafter *Follow-up Review*]. For a summary of the problems associated with SEVIS, see Academe, *International Access to American Higher Education*, 89 *Academe* 47 (Sept./Oct. 2003) (reporting testimony of Shirley M. Tilghman, President of Princeton University, on March 26, 2003 before the Committee on Science of the U.S. House of Representatives, summarizing problems with SEVIS).

15. See *Homeland Security: Performance of Information System to Monitor Foreign Students and Exchange Visitors Has Improved, but Issues Remain*, GAO Rpt. to Cong. Comms., GAO-04-690 (June 2004) (available at <http://www.gao.gov/new.items/d04690.pdf>) (this is the only comprehensive study of SEVIS, which was performed by the General Accounting Office); see also *Homeland Security: Performance of Foreign Student and Exchange Visitor Information System Continues to Improve, but Issues Remain*, GAO Testimony Before Cong. Subcomms., GAO-05-440T, 9, 13, tbls. 4, 6 (Mar. 17, 2005) (available at <http://www.gao.gov/new.items/d05440t.pdf>) (Table 3: Examples of Performance Requirements & Table 5: SEVIS Problems Identified by Organizations.)

16. Vicky J. Rosser, et al., *How SEVIS Has Changed Our Worklives 4-9*, http://www.nafsa.org/_/File/_sevis_study_for_ie-final.pdf (accessed Nov. 20, 2006). A survey of International Students

critical gap. The research discussed in this article seeks to answer the question: What were the implementation problems and resulting impact of SEVIS on university administration, particularly at international offices of higher learning, all over the nation?

The purpose of the study, which is the foundation of this article, is to allow a better understanding of SEVIS' impact on university administration.¹⁷ Furthermore, this research also provides data and a context for critical analysis and objective assessment of the desirability of the USA PATRIOT Act. In order to accomplish this task, Section II will discuss the context for this study, including a brief excursion into the history and design of SEVIS. Section III anchors the discussion by providing an overview of the implementation issues and problems that will be critically examined and extensively discussed in Sections IV through VI. These three sections describe in detail and illustrate, different kinds of internal (Section IV) and external (Section V) SEVIS implementation problems (Section VI) experienced by universities and schools across the nation. Section VII summarizes the findings and discusses the implications of SEVIS on the American higher education system.

II. UNDERSTANDING SEVIS

A. *The Legislative Context*¹⁸

Section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was signed into law on September 30, 1996.¹⁹ IIRIRA required the Attorney General, in consultation with the

and Scholars Advisors (ISSA) by NAFSA in the spring of 2005 showed ninety-one percent have an increased workload; eighty-six percent reported changes of decision making authority; seventy percent reported cleanup of databases and better maintenance of records; eighty-six percent spent more time on regulatory duties than advising; sixty-two percent experienced conflicts between SEVIS mandates and administrative practices; and fifty-six percent were satisfied with SEVIS troubleshooting support. The survey consisted of 1,226 responses from a sample of 2706 (forty-five percent response) with 1168 usable responses. *Id.*

17. Jim Bloedel, *Academic Impact of September 11: New Infrastructure Demands and Policies*, http://www.nasulgc.org/AM2002/presentations/AM2002_Bloedel.pdf (accessed Nov. 20, 2006).

18. H.R. Subcomm. on Immig., Border Sec. & Claims of the Jud. Comm., *Nonimmigrant Student Tracking: Implementation and Proposed Modifications*, 108th Cong. 28 (Apr. 2, 2003) (available at http://commdocs.house.gov/committees/judiciary/hju86265.000/hju86265_of.htm) (testimony of Thomas P. Fischer, former INS District Director, Atlanta District, of the student monitoring system in the United States from WWII to the present submitted).

19. The information to be collected under § 641(a) includes the identity and current address of the alien, the nonimmigrant classification of the alien and any subsequent changes as approved by the attorney general, the current academic status of the alien; and any disciplinary action taken by the institution against the alien as a result of the alien's being convicted of a crime. *Illegal*

Department of State and Department of Education, to set up a program to collect current information from schools and exchange programs relating to nonimmigrant foreign students and exchange visitors during the course of their stay in the United States.²⁰ This law serves as the foundation of the Student and Exchange Visitors Program (SEVP).

In response to the terrorist attacks, on October 26, 2001, the USA PATRIOT Act amended Section 641 of the IIRIRA. The amendment required the development and implementation of SEVIS before January 30, 2003. The Enhanced Border Security and Visa Entry Reform Act of 2002 added to and clarified the information to be collected by SEVIS.

B. The Historical Context

Historically, the State Department, the INS, the Department of Justice (DOJ), and colleges and universities have long struggled with the problem of how to track the status and location of tens of thousands of international students and exchange scholars in the United States.²¹ In 1983, in an attempt to solve this problem, the INS implemented a foreign students monitoring system entitled the Student and School System (STSC). The STSC contained basic information on foreign students and foreign academic visitors enrolled in certified schools in the United States. Under STSC, the INS required universities and institutes of higher education to document and keep track of foreign students and scholars in the United States. Through the use of I-17 and I-20 forms, the universities were to collect the necessary information under the Act, such as application and admission data, arrival and departure dates, academic disciplinary and termination actions, continuation of study, and changes of status of foreign students and scholars.²²

Procedurally, the INS sent a computer printout containing information on all the F-1 students believed to be currently enrolled in a school. The school would then be required to verify the information and return the printout to the INS, which the INS would then use to update the Student/School (ST/SC) data-base.²³ By 1988, the INS determined that

Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), 8 U.S.C. § 1372(c)(1)(A)-(D) (2002). The § 641 information “shall be collected electronically, where practicable.” 8 U.S.C. § 1372(c)(3).

20. *Id.*

21. Inst. of Intl. Educ., *Open Doors 2005 Data Tables*, <http://opendoors.iienetwork.org/?p=69688> (Nov. 14, 2005) (In fiscal year 2004, 362,400 F-1 students and 312,400 J-1 exchange visitors were expected to enter the United States.).

22. See *Follow-up Review*, *supra* n. 14.

23. Boston U., *Intl. Students & Scholars Off., Chronology of Significant Events*, <http://www.bu.edu/isso/sevis/background/chronology/> (Feb. 28, 2005).

the ST/SC paper tracking system was inefficient, inaccurate, and unreliable.²⁴ At one point, INS officials openly acknowledged to Congress that they had no idea how many schools were certified to issue I-20s or how many foreign students were enrolled, obtained their visas by fraud, were out of status, or were overstaying their visas. In effect, once in the United States, foreign students and visitors were free to do whatever they wanted, with minimal hindrance or monitoring.²⁵

The university community shared this bleak assessment. As recently as 2001, a self study by the e-Berkley Steering Committee conceded that all that was needed to register at University of California, Berkeley as a foreign student was a claim stating that the applicant was a foreign student.²⁶ Foreign student applications were not subjected to close inspection of documents or any independent verification of status:

Students, both UGs and Grads, self-report their intended (at the time of enrollment) immigration status on the application for admissions . . . There is no visual confirmation of immigration status by checking the I-94 card at the Office of the Registrar, although there was one required up until about five years ago. The Residence Office does require a visual inspection of documents to support immigration status claims related to claims of California residency. This feeds into the Reg system . . . The result is that there are few *confirmed* immigration statuses for international (nonimmigrant) students at Berkeley, and there are a number (as high as 30%) whose immigration status as recorded in the campus Reg system is erroneous.²⁷

After the 1993 terrorist bombing of the World Trade Center²⁸ there were renewed calls for immigration reform²⁹ especially when it was found that many of the acts of terrorism in the United States before and after 1993 were conducted by individuals who had entered the country on student visas or were non-immigrants. For example, Eyad Ismoil, the

24. *Follow-up Review*, *supra* n. 14.

25. H.R. Subcomm. on Immig. & Claims of the Jud. Comm., *INS's March 2002 Notification of Approval of Change of Status for Pilot Training for Terrorist Hijackers Mohammed Atta and Marwan Al-Shehhi*, 107th Cong. (Mar. 19, 2002) (available at http://commdocs.house.gov/committees/judiciary/hju78298.000/hju78298_0.htm).

26. See SEVIS @ Berkeley, *Focus on students, Working Paper #1: What We've Been Learning* (unpublished paper Nov. 6, 2001, rev. May 2002) (available from SEVIS Project Manager, 3-8305, dwalker@uclink) (briefing paper summarized these types of errors and concerns).

27. *Id.*

28. Federation for American Immigration Reform, *Terrorism Chronology*, <http://www.sullivan-county.com/id3/fair.htm> (accessed Nov. 20, 2006) (gives a chronology of terrorism in the United States).

29. 139 Cong. Rec. 26794, 26795 (May 27, 1993). The 1993 incident led to the formation of a multi-jurisdiction task force in June of 1995 to study the problems and issues with monitoring of foreign students and exchange visitors in the United States.

driver of the van that blew up the World Trade Center in 1993, was a Jordanian who entered the United States as a Wichita State University foreign student in 1989 and subsequently dropped out.³⁰

In 1995, the INS formed the Task Force on Foreign Students Control to investigate how best to reform the foreign students tracking system. The final report, "Control Governing Foreign Students and Schools That Admit Them," became a blueprint for a new kind of INS student tracking reform, with many of its recommendations adopted by the Clinton Administration and incorporated into IIRIRA in 1996.³¹

IIRIRA's passage in 1996 amended the Immigration and Nationality Act (INA) to require universities to report information on nonimmigrant students and exchange scholars from selected countries by 1998.³² Higher education institutions were required to collect fees and report information for all nonimmigrant foreign students with F, M, or J visas from five countries that were designated by the Attorney General.³³ Beginning no later than January 1, 1998, the universities were required to collect the following information on foreign students and visitors: identity and address in the United States, visa classification, dates of visa issuance and/or extension/change, current academic status, whether exchange scholars for the exchange visitor program (J scholar/student) satisfied the terms and conditions of the program, and whether the alien was convicted of and disciplined for a crime.³⁴

In June of 1997, the INS started a pilot project called the Coordinated Interagency Partnership Regulating International Students (CIPRIS), later called the Student and Exchange Visitor Program (SEVP),³⁵ to test the feasibility of the electronic tracking and monitoring of foreign students in the United States. The project was the creation of the INS and the Department of State Bureau of Consular Affairs, the Department of

30. Steven A. Camarota, *The Open Door: How Militant Islamic Terrorists Entered and Remained in the United States, 1993-2001* 19 (Ctr. for Immig. Stud. 2002) (available at <http://www.cis.org/articles/2002/theopendoor.pdf>) (Analyzing the immigration status of forty-eight suspected terrorists since 1993, Camarota concludes that the nation would be more secure against terrorists with improved visa screening, tighter border control, and tracking of foreign students in the United States. Most of the policy recommendations were eventually adopted by the Bush administration and pressed into legislation.).

31. Jennifer Bell, *Georgetown Initial CIPRIS Implementation Study* (unpublished ms. Fall 1998) (copy on file with Author).

32. Deborah Hebert, *Illegal Immigration Act Update*, Assn. for Student Jud. Affairs Newsletter (Spring 1997) (available at <http://www.uiowa.edu/~asjaleg/IIRIRA96analysis.html>).

33. 8 U.S.C. § 1372 (a), (b) (2002) (Section 641 of IIRIRA (a) and (b)).

34. *Id.*

35. Memo. from Michael Cronin, Acting Exec. Commr., Off. Of Programs, U.S. Dept. of Just., Immig. & Naturalization Serv., to Paul Arthur, et al., *Memorandum for Management Team* (July 20, 2001) (available at <http://www.uscis.gov/files/pressrelease/SEVPmemo.pdf>).

State Bureau of Educational and Cultural Affairs (formerly the U.S. Information Agency (USIA)), the Department of Education, and members of the educational and exchange program communities.³⁶

The pilot project involved twenty-one institutions of higher education in Georgia, Alabama, North Carolina, and South Carolina.³⁷ However, the foreign student tracking system did not materialize due to lack of resources as well as vocal and persistent objections by universities.³⁸ CIPRIS was officially terminated in October 1999 by INS Deputy Commissioner Mary Ann Wyrsh.³⁹ Since then, CIPRIS has been shelved, awaiting federal funding and national deployment.

September 11 provided the necessary national will,⁴⁰ political

36. *Id.*

37. For a list of test schools and programs, see Auburn U. Off. Of Intl. Educ., *CIPRIS Pilot School Document Background*, http://web.archive.org/web/20031127163727/http://web6.duc.auburn.edu/academic/other/international_education/sevp/letters/AU_cipris92402.pdf (Sept. 24, 2002).

38. Ltr. from Stanley O. Ikenberry, Pres., Am. Council on Educ., to Richard Sloan, Dir., INS Policy Directives & Instrs. Branch, *Eye on Washington: Letter to INS Expressing Opposition to CIPRIS Draft Regulations* (Feb. 22, 2000) (copy on file with Author) (expressing strong opposition to the draft regulations issued by the INS on 21 December 1999, "Authorizing Collection of the Fee Levied on F, J, and M Nonimmigrant Classifications Under Public Law 104-208," the collection of fees was a federal unfunded mandate and a costly burden to the university administrators); Natl. Assn. of St. Us. & Land-Grant Colleges, *NASULGC Criticizes Proposal for College to Collect INS Fees*, 9 NASULGC Newline 2 (Feb. 2000) (available at <http://www.nasulgc.org/Whatsnew/Newline/2000/NewsFeb00.pdf>) (stating that it is inappropriate, inefficient, and costly for colleges and universities to collect fees and remit them to the INS for implementation of an electronic tracking system). For a rejoinder, see the opinion of twenty-one pilot schools at Am. Assn. of Collegiate Registrars and Admis. Officers, *Pilot Program Participants Oppose CIPRIS Repeal*, http://www.aacrao.org/federal_relations/cipris/cipris_repeal.cfm (accessed Apr. 12, 2006) (stating that the CIPRIS project group members objected to the repeal of CIPRIS arguing that electronic tracking was the future and collection of fees is necessary, that with or without CIPRIS schools were required by law to report data manually and charge fees for processing student applications, that the introduction of CIPRIS did not mean ceding control to the federal government and perhaps enhanced the authority of the school in granting Optional Practical Training (OPT), and that the INS would not be mining the schools for information more than they are doing now). For related comments for or against CIPRIS, see Auburn U., *Comments Received in Response to the CIPRIS Pilot School Statements (as of 11/13/2000)*, (Nov. 13, 2000) (copy on file with Author).

39. For an official account of the origin and development of CIPRIS, see Memo., *supra* n. 35.

40. On September 18, 2002, the Immigration, Border Security, and Claims Subcommittee of the House Judiciary Committee held a hearing entitled the *Implementation of the Foreign Student Tracking Program by the Immigration and Naturalization Service*. H.R. Subcomm. on Immig., Border Sec. & Claims of the Jud. Comm., *Implementation of the Foreign Student Tracking Program by the Immigration and Naturalization Service*, 107th Cong. 1 (Sept. 18, 2002) [hereinafter *Implementation of Foreign Student Tracking*]. On September 24, 2002, there was a hearing before the House Subcommittees on Twenty-First Century Competitiveness and Select Education held a hearing entitled *Homeland Security: Tracking International Students in Higher Education—Progress & Issues Since 9-11*. H.R. Subcomms. on 21st Cent. Competitiveness and Select Educ. Of the Jud. Comm., *Homeland Security: Tracking International Students in Higher Education—Progress & Issues Since 9-11*, 107th Cong. 1 (Sept. 24, 2002).

impetus,⁴¹ financial resources,⁴² and institutional commitment⁴³ to revisit the electronic tracking idea, called SEVIS,⁴⁴ as of July 2001.⁴⁵ Following 9/11, Congress held a number of high profile hearings on the problems with foreign students and visitors and the need for tracking them.

In December 2001, beta testing of SEVIS formally launched at ten schools in the Boston area. In May 2002, the Enhanced Border Security and Visa Entry Reform Act of 2002 was enacted.⁴⁶ This act required that additional information be captured by the electronic system, including issuance of I-20s and visas and enrollment of students. On May 16, 2003, the INS published a proposed rule for the implementation of SEVIS to solicit public comments.⁴⁷ On June 13, 2002, the INS released the final interface control document for third-party vendors to facilitate the development of software supporting SEVIS.⁴⁸ On July 1, 2002, the INS invited voluntary participation in SEVIS. The final regulation was published on December 11, 2002.⁴⁹

41. Fedn. for Am. Immig. Reform, *An Invitation to Terror: How Our Immigration System Still Leaves America At Risk* 9-10 (FAIR Horizon 2002) (available at <http://www.fairus.org/site/DocServer/ACF2C5B.pdf?docID=361>).

42. Ltr. from David Ward, Pres., Am. Assn. of Collegiate Registrars & Adm. Officers, to George W. Bush, Pres., U.S., *Regarding the Student and Exchange Visitor Information System (SEVIS)* (Oct. 12, 2001) (available at http://www.aacrao.org/federal_relations/cipris/bushletter.cfm) ("I write to urge you to designate \$36.8 million of the Emergency Supplemental appropriations package (P.L. 107-38) to the Immigration and Naturalization Service (INS). These funds would be used to implement the Student and Exchange Visitor Information System (SEVIS), as proposed by Sen. Dianne Feinstein.")

43. H.R. Subcomms. on 21st Cent. Competitiveness & Select Educ. of the Comm. on Educ. & the Workforce, *Tracking International Students in Higher Education: A Progress Report*, 109th Cong. 9 (Mar. 17, 2005) (available at <http://edworkforce.house.gov/hearings/109th/21st/jointhea031705/cerda.htm>) (testimony of Mr. Victor X. Cerda).

44. See Memo., *supra* n. 35.

45. Philip Martin & Susan Martin, *Immigration and Terrorism: Policy Reform Challenges*, http://migration.ucdavis.edu/ceme/more.php?id=21_0_5_0 (Oct. 18, 2001).

46. Pub. L. No. 107-173, 116 Stat. 543 (2002). For a summary of key provisions of the Enhanced Border Security and Visa Entry Reform Act, see U.S. Sen. Republican Policy Comm., *Legislative Notice: H.R. 3525—Enhanced Border Security and Visa Entry Reform Act*, <http://rpc.senate.gov/files/L37IMMIGRATIONjj041102.pdf> (Apr. 11, 2002) (analyzing H.R. 3525, 107th Cong. (Dec. 19, 2001)).

47. *Retention and Reporting of Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS)*, 67 Fed. Reg. 34862 (May 16, 2002).

48. PeopleSoft, *PeopleSoft Student Administration and SEVIS: Statement of Direction—Update*, http://cms.calstate.edu/T6_Documents/NewsAndPublications/General/SEVIS%20Direction%207_26_02.pdf (July 2002).

49. 67 Fed. Reg. 7656 (Dec. 11, 2002); U.S. Immig. & Customs Serv., *Student and Exchange Visitor Information System (SEVIS), Final Rule Implementing SEVIS: Tightening and Improving Procedures for Foreign Students Visiting the United States*, http://www.ice.gov/pi/news/factsheets/0212FINALRU_FS.htm (Dec. 11, 2002).

C. SEVIS's Design

SEVIS provides one-stop shopping for the processing of international students and exchange scholars entering the United States.⁵⁰ ICE described SEVIS as “an automated process to collect, maintain and manage information about international foreign students and exchange scholars during their stay in the United States.”⁵¹ SEVIS tracks international students and scholars while they are in the United States throughout the entire process, including visa application, Port of Entry (POE) documentation, attending school, changing of status, and leaving the country. In doing so, SEVIS provides an electronic information exchange system between the DHS (ICS), ports of entry, the State Department (Office of Exchange Coordination and Designation and the Bureau of Educational and Cultural Affairs), U.S. embassies and consulates, and every institution of higher education that sponsors international students.⁵²

SEVIS collects the following data on students/scholars: student registration; local address; full-time student status; leave of absence information; disciplinary action; termination of studies; dependents information; change in major or research specialty; change in title date of departure; change in funding or salary; change of name; program extension, school transfer, change in level of study, employment authorization, and reinstatement; failure to maintain status or complete program; prior approval to work or do research outside of the university or to transfer to a different U.S. institution.⁵³ In addition to collecting the above information, SEVIS also adopts a twenty-four-hour reporting window, which is “data-centric” as opposed to “document-centric.”⁵⁴ The system is initiated by the students and scholars as opposed to the system itself (student driven), requires continuous updating (just-in-time reporting), uses forms generated and controlled by the INS (centrally controlled), provides a real-time, interactive interface, and provides for

50. See *Immigration and Naturalization Service's Contacts*, *supra* n. 4, at 3.

51. U.S. Dept. of Homeland Sec., *ICE Prepares U.S. Schools and Foreign Students for August 1, 2003 SEVIS Deadline* 3, (July 29, 2003) (available at <http://www.immigration.com/newsletter/1/icepressreleasesevis.pdf>).

52. For step-by-step processing of foreign student visa with SEVIS, see Lawrence Martin, *S.E.V.I.S. and International Student Admissions*, <http://web.archive.org/web/20041029165047/http://cgsnet.org/pdf/Martin.pdf> (accessed Jan. 21, 2006).

53. Data required to be sent to SEVIS includes data specified in the following: 8 C.F.R. § 214.3(g) (2006); 22 C.F.R. § 62.70 (2002); 8 U.S.C. § 1372; Pub. L. No. 107-56 at § 416; Pub. L. No. 107-173 at § 501.

54. Newfront Software, *Roadmap to SEVIS* 3, <http://www.newfrontsoftware.com/sevis/docs/fsaATLAS6RoadMapSEVIS.pdf> (Apr. 24, 2002).

real-time web-based input and batch input.⁵⁵

*D. How SEVIS Works*⁵⁶

After admitting an international student or research scholar, the university notifies DHS via SEVIS. If DHS approves, it will issue either a bar-coded I-20 or DS-2019 to the student or scholar to confirm that he/she is accepted by an authorized university to pursue study or conduct research in the United States. The student or research scholar can then apply for a visa at the nearest U.S. consulate abroad. The consulate will confirm the student's I-20 or DS-2019 with the university and DHS via SEVIS. If everything is in order, the student or scholar will be issued a visa. When the student/scholar arrives in the United States, the DHS at the immigration desk will check the student/scholar's visa against SEVIS and confirm that the student/scholar has arrived in the United States. The student/scholar must report within 15 days to the university. Failing to timely appear at the university will result in automatic termination of student/scholar status, requiring voluntary departure or forced deportation. If the student/scholar arrives on time, the school promptly confirms the enrollment of the student/scholar at the school with SEVIS. The university must provide regular and timely updates via SEVIS on the status and progress of the student/scholar at the university via SEVIS for the duration of his/her academic career in the United States.⁵⁷

III. IMPLEMENTATION DIFFICULTIES WITH SEVIS

A. Introduction

It is evident that given the highly-charged political environment against nonimmigrants and foreign students after 9/11, SEVIS was a *fait accompli*. After 9/11, it was no longer tenable to debate about the necessity, utility, or effectiveness of SEVIS, as had been done with CIPRIS. Instead, the focus of the debate shifted from policy to execution problems. Specifically, who should be responsible for the funding, operation and control of SEVIS? The problems and difficulties with

55. *Id.*

56. The substantive requirements and procedures for SEVIS have been promulgated in separate rule-making proceedings. See 67 Fed. Reg. 34862 (May 16, 2002) (proposed rule implementing SEVIS); 67 Fed. Reg. 44344 (July 1, 2002) (interim rule for schools to apply for preliminary enrollment in SEVIS); 67 Fed. Reg. 60107 (Sept. 25, 2002) (interim rule for certification of schools applying for enrollment in SEVIS); 67 Fed. Reg. 76256 (Dec. 11, 2002) (DHS's final rule implementing SEVIS); 67 Fed. Reg. 76307 (Dec. 12, 2002) (DOS interim rule implementing SEVIS).

57. See *Implementation of Foreign Student Tracking*, *supra* n. 40.

SEVIS must be viewed in this larger context (i.e. implementation issues were used as a pretext to debate the propriety and utility of SEVIS).

The implementation problems that attracted the most attention and repeated complaints involved the feasibility, functionality, and effectiveness of SEVIS in monitoring thousands of schools, tracking hundreds of thousands of students, and documenting millions of “events” each year. The schools were obsessed with operational issues such as economic, legal, technical and managerial issues. They wanted to fulfill the SEVIS mandate with least disruption and minimal resource outlay possible. The INS was pre-occupied with compliance and enforcement concerns. Ultimately, the INS wanted SEVIS to be technically “available” in accordance with the USA PATRIOT Act by January 30, 2003.⁵⁸ Although, the INS and the schools had their own expectations about SEVIS, however, both were less interested in making the system serve the educational objectives and personal needs of the students. The welfare and interests of the consumers of international education were never seriously taken into account. This is the sub-text of the SEVIS high drama waiting to be explored, and should be deplored.

B. The Implementation Process

The implementation of SEVIS, which consists of development,⁵⁹ deployment,⁶⁰ employment,⁶¹ was and still is a huge undertaking in terms of resources and manpower, for both the government and universities. The USA PATRIOT Act required the creation of an entirely new⁶² electronic monitoring and tracking system, with the ability to monitor and track every international students/scholar coming into the United States, for programs admitting international students/scholars by January 30, 2003.⁶³ This implementation was to be followed by a full

58. Michael McCarry, *Hill Questions INS Capacity to Use SEVIS Data*, http://www.aacrao.org/transcript/index.cfm?fuseaction=show_view&doc_id=673 (Mar. 8, 2002) (stating that at a hearing on March 7, 2002, Rep. Harold Rogers of Kentucky, former chairman of the Commerce, Justice, State appropriations subcommittee, expressed concern with INS’s ability to use SEVIS to track and prosecute offending foreign students and exchange visitors holding F, J, and M visas).

59. Development is the conceptualization, planning, and preparation stage, including CIPRIS (1997) and Operational Prototype (1999).

60. Deployment is the first step of implementation, i.e. making SEVIS available for use. With the DHS it meant “technical availability” and with the schools it meant “functional availability.”

61. Employment is the actual use of SEVIS for processing foreign students.

62. As shall be observed below, the idea of an international student tracking system was not new and has been experimented with since 1996. See Fedn. For Am. Immig. Reform, *supra* n. 42.

63. The date was extended to Feb. 15, 2003 for technological reasons. Natl. Assn. for Student Fin. Aid Adminstrs., *SEVIS Grace Period Extended Until February 15, 2003*, <http://www.nasfaa.org/publications/2003/rsevisextend013103.html> (Jan. 29, 2003).

accounting of all existing students in the United States by August 1, 2003.⁶⁴ All of this was to be achieved within a tight time frame established by Congress: last minute regulations imposed by INS/DHS,⁶⁵ and unilateral rule making concocted by administrators,⁶⁶ all within a chaotic and uncertain regulatory regime and a complex and intricate technical environment.⁶⁷

In the USA PATRIOT Act, the U.S. Government set forth a January 30, 2003 deadline for the full implementation of SEVIS without consulting universities and other agencies. On May 16, 2002, the INS published the proposed rule⁶⁸ to implement the electronic collection and reporting process mandated under Section 641 of the IIRIRA Act of 1996 (IIRIRA). On June 13, 2002, the INS first released the final interface control document to facilitate SEVIS software development by third-party vendors.⁶⁹ On July 1, 2002, the INS invited voluntary participation in SEVIS. The final regulations, "Retention and Reporting of Information for F, J, and M nonimmigrants; Student and Exchange Visitor Information System (SEVIS); Final Rule," was published on December 11, 2002, just fifty days before "D-Day."⁷⁰

C. A Fundamentally Flawed Process

From the very beginning of the program, school administrators and educator associations, not to mention foreign students and exchange scholars, have expressed grave reservations and major misgivings about the design, planning, funding, and operability of SEVIS.⁷¹ The President

64. Elizabeth B. Guerard, *New SEVIS Rules Extend Deadline for Entering Student Information to August 1; Compliance Date of January 30 Remains*, <http://www.nasfaa.org/publications/2002/rsevisdeadlines121802.html> (Dec. 18, 2002).

65. In the last six months to launch date, May 2002–Jan. 2003, DHS/DOS promulgated no less than five sets of regulations to implement the SEVIS. See *supra* n. 56. For a more detailed discussion, see *infra* sec. VI(B)(3).

66. Hartle & Burns, *supra* n. 12. (The progress in the implementation of SEVIS to date resulted from a unilateral imposition of the regulators, hoping that the schools would comply and could adjust.).

67. Ltr. from NAFSA: Assn. of Intl. Educators, to Immig. Naturalization Serv., U.S. Dept. of Homeland Sec., *Letter of Comment to INS on the Service's Proposed Rule, Published on May 16, 2002, Entitled "Retention and Reporting of Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS)"* (June 12, 2002) (at <http://www.nafsa.org/content/publicpolicy/NAFSAonthelssues/NAFSAcommentletterfinal.htm>) ("Given that the Service does not realistically know at this time when the system will be fully available to schools, the reporting deadline should be set through a separate rulemaking once the system is fully tested and complete").

68. 8 C.F.R. pts. 103, 214 (2002).

69. PeopleSoft, *supra* n. 48, at 6.

70. 8 C.F.R. pts. 103, 214, 248, 274a (2002).

71. *Id.*; See Melissa Flagg et al., *Visa & Visiting Scientists, Students, & Trainees* 15, http://thefdp.org/Present_2_May2003.pdf (accessed Jan. 16, 2006) (panel discussion focusing on

of the University of Maryland, C.D. Mote Jr., testified before the House Subcommittee on the Twenty-first Century Competitiveness and Select Education that after initial difficulties in implementation, SEVIS was functioning relatively well. However, some enduring problems existed which included the following: schools unable to fix data entry problems, limited university resources devoted to maintaining SEVIS and not to servicing student education, SEVIS fees (\$100) absorbed by the University (\$50,000) to avoid brain drain, lack of feedback from SEVIS on institutional performance, visa application fees prohibitive to new students, and a complicated process disruptive for continuing students.⁷²

D. The SEVIS Challenge

1. Enormity of Challenge

The task of implementing SEVIS was a daunting challenge and stressful experience from the perspective of the schools and programs. Ms. Danley, Executive Director of Enrollment Services from Washington State University, observed:

The January 30, 2003, implementation deadline seemed unrealistic and impossible. Further, the enormity of this unfunded mandate created serious concerns at institutions. Those with moderate to large international student and scholar populations, such as Washington State University, seemed particularly vulnerable. Washington State University enrolls 22,166 students, of whom 1255 are international students. Additionally, the University employs approximately 150 scholars at any given time.⁷³

The enormity of the implementation task can be gauged by looking at the total number of schools the government (DHS) inspected and certified between July 1, 2002 and January 30, 2003—the final months before the SEVIS program was supposed to be operational.

student recruitment problems, student/mentor relations and implementation and maintenance issues).

72. H.R. Subcomms. on 21st Cent. Competitiveness & Select Educ. of the Comm. on Educ. & the Workforce, *Tracking International Students in Higher Education: A Progress Report*, 109 Cong. 61 (Mar. 17, 2005) (available at http://www.house.gov/ed_workforce/hearings/109th/21st/jointhea031705/mote.htm) (testimony of C.D. Mote Jr., President, University of Maryland, College Park).

73. Janet V. Danley, *SEVIS: One Institution's Tale of Implementation*, <http://www.pacrao.org/docs/resources/writersteam/SEVIS.doc> (accessed Nov. 21, 2006).

Table 1: SEVIS Certification Workload Statistics as of January 31, 2003⁷⁴

Application dates	Applications	Approved	Denied	Pending
July 1 to Sept. 24, 2002	1,779	1,418	361	0
Sept. 25 to Nov. 15, 2002	2,856	1,927	36	893
Nov. 16, to Jan. 30, 2003	1,305	0	0	1,305
Total	5,940	3,345	397	2,199

According to DHS data, as of December 10, 2003, DHS had successfully certified 8,795 schools and 1,383 exchange programs for the SEVIS system. Depending on sources consulted, there were between 8,000 to 74,000 SEVIS schools and programs in the United States at that time, many of them yet to be certified.

As SEVIS end-users, international departments and exchange programs were responsible for the input, update, and maintenance of all incoming and continuing students/scholars found in the United States by January 30, 2003. In 2003, the total number of J-1 students and J-1 scholars (excluding dependents) that needed to be tracked was 869,118, of which 353,342 were new students and 515,776 were continuing students.⁷⁵ This was an impossibly enormous task. DOJ inspector general Glenn A. Fine testified before the Subcommittee on Immigration, Border Security, and Claims on September 18, 2002 and observed that “full implementation of SEVIS is unlikely by January 30, 2003, based on the amount of work that remains to be accomplished.”⁷⁶

Furthermore, SEVIS required schools to keep track of students and scholars in 150 data element areas (for example, address, department, etc.). Any change in one of the 150 data elements was to be reported within twenty-four hours. Since historically foreign student/scholar data was not routinely collected and centrally organized, and there was little communication between different databases and no reporting

74. *Follow-up Review*, *supra* n. 14., at 13 tbl. 1 (“SEVIS Certification Workload Statistics as of January 30, 2003”).

75. See NAFSA: Assn. of Intl. Educators, *Summary of SEVIS Conference Call*, NGLU 2003-12-a (Dec. 3, 10, & 17, 2003) (available at <http://web.archive.org/web/20040407163840/http://www.nafsa.org/content/ProfessionalandEducationalResources/ImmigrationAdvisingResources/nglu200312a.pdf>) [hereinafter NGLU 2003-12-a].

76. See *Congress Learns*, *supra* n. 10, at 17 (Fine’s observation was echoed by Terry W. Hartle, senior vice president of the American Council on Education (ACE) who represented more than 75 education and exchange visitor organizations before the same hearing).

relationship between university departments, international offices found themselves delayed. These offices had to find ways to create a centralized and integrated foreign student information administration system capable of meeting SEVIS data recording and reporting requirements, which was not an easy task.⁷⁷

2. *Lack of Support*

In the months before the SEVIS launch, many school administrators and international educators pled with the federal government to provide clearer and better guidance, accessible and competent help, available and helpful training, and reasonable and adequate lead time before the implementation of SEVIS. Most requests were ignored and many cautions were brushed aside. This frustrated many people involved in SEVIS, even private software developers. For example, in April of 2002, Newfront, one of the largest international student administration software developers responsible for developing a SEVIS interface for the schools, cautioned against rushing towards implementation of the SEVIS program and disregarding technology readiness issues.⁷⁸

No one had expected SEVIS would impose such drastic requirements on international offices. Specifically two aspects of SEVIS, the 24-hour reporting window and the extensive data element, will have a huge impact on the international offices. Added this to the frustrating lack of information on the SEVP from the INS over the last two years. I persistently urged SEVP officials to deliver technical specification as early as possible so that Newfront would have adequate time to design and test fsaATLAS and SEVIS, and so that school could reevaluate their business processes, workload, data systems, and make financial arrangements.⁷⁹

3. *Signs of Frustration*

The friendly reminders and bitter objections fell on deaf ears. The INS (later DHS) decided to impose SEVIS on the education community on its own terms and according to its own timetable. This led frustrated administrators and anxious educators to vent their individual anger and collective grievances privately at conferences and at public hearings.⁸⁰ A

77. See Newfront Software, *supra* n. 54, at 7–10.

78. *Id.*

79. *Id.*

80. For a day by day account of how a University of California administrator was frustrated by the INS and SEVIS, see Sheldon Zola, *Request for Moratorium on BCIS Requirement for Electronically-produced I-20 Forms and for Reversion of SEVIS to 'Test & Development' Status*, <http://web.archive.org/web/20040108150914/http://www.ias.berkeley.edu/siss/hurricane/sissworking>

satiric song prepared at a NAFSA conference reflected the level of frustration and provide insights into its cause.⁸¹

SEVIS Caused Psychosis⁸²

Chorus:

I've been diagnosed today with SEVIS caused psychosis
 Even just the sound of it is something quite atrocious
 If you have it long enough you just might need hypnosis
 I've been diagnosed today with SEVIS caused psychosis.

Verse 1:

We thought that we'd be really smart and get on SEVIS early
 Even though the program seemed to be a little squirrelly
 We put all the I-20s in we thought that we could handle
 Then last week we learned all those I-20s had been cancelled.
 Repeat Chorus

Verse 2:

Last week I had a problem that was totally confusing
 The stress I felt from SEVIS then was truly not amusing
 The manual was clear as mud, I needed help much faster
 So I called the Help Desk and I got 4 different answers.
 Repeat Chorus

Verse 3:

Whenever SEVIS kicks you off and doesn't seem to work right
 When data entry's piled so high that it gives you a big fright
 Remember this advice next time you find yourself in this plight
 SEVIS works the best if you log on just after midnight
 Repeat Chorus

4. *Call for Help*

As early as June of 2002, the American Council on Education (ACE), one of the largest and most prestigious higher education associations in the United States, called for delayed compliance with SEVIS:

papers/moratorium.doc (Mar. 25 & 26, 2003) (working paper #18 for UC-wide SEVIS meeting, U. Cal. Irvine, proposing a moratorium on SEVIS).

81. See NAFSA New Orleans Conference, *SEVIS Songs Song at C* (Oct. 27–Nov. 1, 2003) (copy on file with Author).

82. Julie Sinclair, SEVIS Watch: News About the INS SEVIS Program, from a Technology Perspective, <http://radio.weblogs.com/0103492/categories/sevis/2003/04/09.html> (accessed Nov. 21, 2006) (song entitled "SEVIS Caused Psychosis," sung to the tune of "Supercalifragelisticpealidocious.").

In lieu of picking a January 30, 2003 deadline at this point, we recommend that a compliance date be set at 180 days *after* the Inspector General certifies that, based on benchmarks similar to those outlined above, SEVIS is fully operational. Colleges and universities will work to meet the deadline INS ultimately sets for compliance. It is impossible, however, to make an estimate as to how long it will take institutions to comply with a system that does not yet exist. Certification by the Inspector General should follow expeditiously once that office ascertains that the steps outlined above have been completed.⁸³

Even the DOJ's Inspector General, Glenn A. Fine, concluded that the compliance date was an unrealistic one by asserting, "full implementation of SEVIS is unlikely by January 30, 2003, based on the amount of work that remains to be accomplished."⁸⁴

IV. INTERNAL IMPLEMENTATION DIFFICULTIES

A. Legal-Technical Requirements

In order to meet SEVIS statutory requirements, technological specifications, and student administration needs, a university SEVIS information data system should preferably have the following features. In terms of operating system and platform, it should be a web-based system that is accessible worldwide via the Internet and capable of interfacing with other university IT systems, such as registrar, human resources, student information, payroll, and tax systems. For schools which have a large foreign student/visitor contingent, batch data export/import capabilities connected to the INS are a necessity.⁸⁵

In terms of functional capacity, the schools must perform many functions. The school's SEVIS system should be able to store and generate authorized forms, such as Form I-20, Form IAP-66, Form I-538,

83. Ltr. from David Ward, Pres., Am. Council on Educ., to Dir., Regulations and Forms Servs. Div. Immig. & Naturalization Serv., *Re: Comments on Proposed Rule: "Retention and Reporting of Information for F, J, and M Nonimmigrants: Student and Exchange Visitor Information System (SEVIS)"* INS No. 2185-02 (RIN 115-AG55) (June 14, 2002) (available at <http://web.archive.org/web/20040625030727/http://www.acenet.edu/washington/letters/2002/06june/ins.sevis.cfm>) (ACE recommended that SEVIS compliance deadline be set at 180 days after "Inspector General certifies that SEVIS is fully operational and software is available for purchase.").

84. See *Congress Learns*, *supra* n. 10, at 17 (Fine's observation was echoed by Terry W. Hartle, Senior Vice President of the American Council on Education (ACE) who represented more than seventy-five education and exchange visitor organizations before the same hearing.).

85. As designed, the SEVIS system allowed for both interactive and batch mode input. The INS, however, did not make batch mode input of data one of its "available" technology features. Schools had to and still have to develop and deploy batch mode at their own expense. Who was to provide for and fund the development of batch technology was an area of heated dispute.

Form I-539, Form I-129, Form I-140, Form I-485, and Form I-765.⁸⁶ The system must also keep track of critical events in a student's course of study, like program enrollment, performance and extensions, adjustment and change of status petitions, reinstatement petitions, and applications for Optional Practical Training (OPT) for students in F-1 visa classification.⁸⁷ Further the system needs to generate a variety of standard reports for auditing purposes, "alert" users to major expiration dates (e.g. expiration of an international's employment authorization) and should have drop-down lists as required by law.⁸⁸ Also, the system must meet legislative and regulatory requirements, protect the privacy of the information collected, be stored with multi-level security access, and be highly integrated with other databases in the university so that there is no duplication of effort or waste of resources.⁸⁹

Additionally, the university has to take many steps to successfully deploy and effectively employ SEVIS with batch technology.⁹⁰ The first step is to review SEVIS-related law, such as Section 641 of the IIRIRA, and related regulations, such as the final regulations for F, J, and M nonimmigrants, and technical documents such as the final interface control document.⁹¹ These documents set forth the basic legal-technical-functional specifications/ requirements of the SEVIS system. The second step is to conduct a detailed analysis of current data elements and processing routines in the university to determine what foreign student data is being collected and how and where the data is stored and processed.⁹² This exploratory data mapping exercise provides critical information on current data structures and information processes in the university necessary for the SEVIS interface.

The next step is to conduct a detailed analysis of the university's overall IT infrastructure, architecture, and strategy to determine how to gather and electronically transmit SEVIS data via the batch interface

86. David Clubb, *SEVIS COMPLIANCE: Project Scope Definition Document, Database Development Project*, http://web.archive.org/web/20050522032219/http://www.auburn.edu/academic/other/international_education/sevp/regs/SEVIS+Project+Scope+Definition+Document_NAFSA_generic.doc (June 5, 2002).

87. *Id.*

88. *Id.*

89. *Id.*

90. For a look at a typical month-by-month/activity-by-activity SEVIS implementation plan at the University of Wisconsin-Milwaukee, see U. of Wis. -Milwaukee, *UWM Ensures SEVIS Compliance*, <http://www.uwm.edu/IMT/Info/IOTOnline/FocusOctNov03/ensures.html> (accessed Nov. 21, 2006).

91. *Id.*

92. *Id.*

mode.⁹³ This helps to ascertain existing capacity and readiness of the university to implement SEVIS. The following step is to compile a formal and comprehensive report, which describes in detail the current data management process to ascertain and identify any deficiencies or inadequacies in meeting SEVIS legislative and technological requirements.⁹⁴ During this process there is a need to outline, in checklist form, what needs to be done to make SEVIS operational and functional.

Next, based upon the above legal, systematic, and process assessment, the university has to make a critical decision whether to develop its own SEVIS compatible system or purchase an off-the-self SEVIS application kit from the market.⁹⁵ This decision requires the involvement of university senior administrators with input from mid level IT executive and front-line computing staff.⁹⁶ It also requires balancing costs and benefits of using internal resources versus external resources in the implementation process. If the school decides to purchase an off-the-shelf kit, the purchase decision must be coordinated with the university's purchasing office in compliance with university policies and guidelines and may involve product research and comparison testing.⁹⁷

Finally, the school must install the hardware and implement the software, which entails extensive, complex, and time consuming technical and managerial tasks.⁹⁸ The entire SEVIS implementation process involves working with many people such as a financial controller, legal counsel, and IT staff and involves integrating a large number of academic and business departments, such as an international student office and graduate schools. Implementation also involves interfacing with a variety of different information systems within the university.⁹⁹ These steps take time and coordination and cannot be imposed by fiat. In addition, fully and successfully integrating SEVIS with an existing university IT system is a trial and error process.

Determining the scope of the cost and benefit analysis of an electronic tracking system it is very difficult because there are many factors involved.¹⁰⁰ Costs include initial migration, ongoing system costs,

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Since no final SEVIS regulation was available by October 2002, vendors were delayed in offering software meeting legal and technical specifications before January 2003.

98. U. of Wis. -Milwaukee, *supra* n. 90.

99. *Id.*

100. The Georgetown CIPRIS implementation report concluded by observing that it was too early to tell the net cost versus the benefits to the CIPRIS system.

and costs for specialized and dedicated international service personnel.¹⁰¹ Some cost savings result from improving the processing of international students. The benefits include reducing data duplication, increasing reliability, improving efficiency, and timely fulfillment of international student services.¹⁰² These cost/benefit considerations do not include indirect costs or benefits such as impacts on the mission of the international student office, the role of foreign student advisors, the relationship between international students and the university, staff morale, and foreign student/visitors welfare.¹⁰³

In the following sections, this article will document and discuss the variety of in-house problems and difficulties, legal and technical, encountered by school administrators in developing and deploying SEVIS. The issues covered include legislative administrative burden, implementation problems, technical difficulties, and capitalization and maintenance costs.

B. The SEVIS System and Institutional Barriers

The building of a centralized, comprehensive, and integrated foreign student and visitor IT system with tracking capabilities sufficient to meet the SEVIS legislative mandate as well as following existing university protocols is a daunting, transformational task. There are many reasons for this. First, the introduction of SEVIS into an existing IT system implicates the school's own IT vision and strategy. An IT initiative, such as SEVIS, is not a one-time investment or stand-alone program. The initiative is tied into the schools' core values,¹⁰⁴ institutional mission,¹⁰⁵ strategic planning,¹⁰⁶ governance structure,¹⁰⁷ and communication

101. U. of Wis. -Milwaukee, *supra* n. 90.

102. *Id.*

103. *Id.*

104. For example, the core values of Bowling Green University include: "[r]espect for one another; [c]ooperation; [i]ntellectual and spiritual growth; [c]reative imaginings; [and p]ride in a job well done." Bowling Green U., *University Values, Vision and Goals*, <http://www.bgsu.edu/colleges/gradcol/catalog03-04/University/univ9.htm> (accessed Nov. 20, 2006). These values are not compatible with a draconian police state upon which SEVIS is built.

105. A university's primary mission is to educate rather than monitor, and foster free exchange of ideas rather than restrict offensive ideas. Jonathan Laurence, *Ramadan's US Ban is Ill-Conceived*, *The Daily Star* (Beirut, Lebanon) 10 (Sept. 4, 2004) (available at http://www.jonathanlaurence.net/downloads/tarek_oped.pdf) (Swiss theologian Tariq Ramadan was not allowed to accept a visiting professor position at Notre Dame University after State Department denied a visa at the behest of the Department of Homeland Security due to an unarticulated security risk.)

106. The imposed SEVIS system has the effect of disturbing a university's strategic plan. For example, in 2002-2003 the University of Pennsylvania (U. Penn.) had 3,856 foreign students, of which 24% (937) were undergraduate, 25% (969) were Ph.D.s, 33% (1259) were in Masters programs, 4% (160) were in English language programs, and 14% (531) were in practical training. The stringent

networks.¹⁰⁸ In essence, SEVIS (as an IT initiative) must be aligned with the school's values, structure, process, and culture. In this regard, understanding a school's education and IT vision, mission, values, environment, and culture is critical for the successful implementation of SEVIS. These factors were ignored in the current SEVIS implementation process. The DHS has approached this as a purely legal, administrative, and enforcement exercise. This approach reflected a large degree of ignorance and a certain amount of arrogance inside the beltway Washington D.C. mindset.

Second, the introduction of new SEVIS technology upset long established institutional arrangements, threatened deeply ingrained organizational culture and challenged broad personal interests.¹⁰⁹

Vermeer and Veth (1998) consider the problems of inter-organizational data integration and the development of a common data model across many interdependent network participants. After a study of over 10 different central database initiatives they found that almost all of them suffered from lack of support. They concluded there were two important reasons for the lack of success; first, political reasons such as *hidden agendas* and *disruption of the balance of power* and second, the *large number of data fields* resulting in large data administration costs and lack of flexibility at a local level.¹¹⁰

visa process affected the university's strategic plan in maintaining UPenn as the premier leader in international education. Robert Barchi, *Council State of the University*, 50 U. Pa. Almanac 3, 4 at "International Students" (Nov. 11, 2003) (available at <http://www.upenn.edu/almanac/v50/n12/council.html>).

107. In university governance, academic matters are in the hands of the professors, chairs, deans and provost. With SEVIS, university academic governance has to accept non-negotiable instruction and zero-tolerance enforcement from the Department of Homeland Security in the name of national security. V. Lane Rawlins, *President's Updates for the Faculty & Staff of Washington State University Number 16*, <http://www.wsu.edu/president/update16.html> (Mar. 7, 2003) (WSU will cooperate with the government on national security matters but will be vigilant in carrying out its function and responsibility as a free and just educational institution).

108. The university has many networks, usually not centralized. "Thomas Jefferson University faced the challenge of SEVIS compliance on many different levels. The university comprises an upper-division undergraduate health professions college, a graduate school, a medical college, and a teaching hospital. The information required for reporting to SEVIS was stored in different systems." John Martines & Kenneth Oeffler, *EDUCAUSE Mid-Atlantic Regional Conference 2004 Archives, Poster Sessions*, "SEVIS Implementation Challenges," http://www.educause.edu/Poster%20Sessions/1436?MODE=SESSIONS&Heading=Poster%20Sessions&Product_Code=marc04/PS%25&Meeting=marc04 (Jan. 14, 2004).

109. Shirley Gregor et al., *Web Information Systems Development: Some Neglected Aspects*, http://cq-pan.cqu.edu.au/david-jones/Publications/Papers_and_Books/wis99/ (Jan. 28, 1999) ("It is suggested that when developing WIS, particular attention should be paid to the social and political aspects of interorganizational systems, to human-computer- interaction issues and usability guidelines, and to issues associated with the development of hypermedia systems.").

110. *Id.* (citing B. H. P. J. Vermeer & T. F. L. Veth, Presentation, *Interorganizational Data*

Theoretically speaking, SEVIS is an Inter-Organization System (IOS), within and without the university.¹¹¹ As such, it raises traditional IOS problems in the design and implementation phases.¹¹² Developing and implementing an IOS requires the cooperation and coordination of two or more information trading partners. This includes the adoption of standards for the external trading environment and educating trading partners about new technologies and procedures. The need to synchronize development efforts among the trading partners, especially in shared standards and required updates, requires lengthy negotiation and flexible compromise.¹¹³ The need to reevaluate business practices to improve efficiency of operation among the organizations, for the betterment of a collective whole (the U.S. as a nation), is difficult given vested interests, entrenched values, and fortified connections. Most importantly, discovering relationship issues that are often more complex than technical issues requires reevaluation and readjustment of past practices by the trading partners.

Any successful organizational change process must start with incorporating other university community members and integrating other academic/business units within the university. This requires educating the university community as to the needs for and benefits of having such a system on campus. Conversely, it entails pointing out the inadequacies and dysfunctional aspects of the existing foreign student information system in addressing emerging security and administrative needs.¹¹⁴

This can be achieved by keeping the university community members (executives, administrators, business managers, and faculty) and other academic units (law school, business school, and medical school) informed and abreast about latest SEVIS developments and requirements.¹¹⁵

Integration: Theory and Practice (11th Intl. Bled Elec. Commerce Conf., Bled, Slovenia, 1998).

111. R.H. Sprague & B.C. McNurlin, *Information Systems Management Practice* passim (3d ed., Prentice Hall 1993).

112. *Id.*

113. *Id.*

114. *Id.*

115. One of the very few universities which has studied the implications of a student electronic monitoring system is Georgetown University. In the summer of 1998, the English as a Foreign Language program and the International Students and Scholars Services conducted a study to assess the implications of introduction of CIPRIS for Georgetown University. As part of the study, the researcher interviewed Duke University, one of the first CIPRIS (2I university testers) pilot project groups. Duke was picked because it was considered similar to Georgetown in terms of mission, size, structure, and international student environment. The report concluded that it was too early to determine the net cost versus benefits of the CIPRIS system, but certain observations could be safely made. The report further observed that the successful implementation of electronic tracking entailed

Having enlisted other university community units and members in the cause of change, the next step is to mobilize their resources and coordinate their efforts to achieve a common goal. This includes centralizing foreign student admission functions and processes in one physical location to reduce redundancy, assure uniformity, and achieve efficiency; purchasing hardware and software to produce I-20s from one central office; upgrading existing hardware to facilitate software program adaptation and reduce application errors; negotiating with the registrar to include J visitors on student information systems; appointing and training specialized and dedicated Designated School Officials (DSOs) to handle data input and forms production; building up organization expertise in SEVIS system maintenance and operations; standardizing the policies and processes for foreign students between DSO from different schools, e.g. law versus business versus medicine; integrating and reconciling different foreign student databases within the university IT systems, e.g. registrar's office (enrollment, degree pursued, course taken, drop/add) with housing office (arrival date, on campus address); providing for real-time interoperability between university student information systems and the international student data-base; and finally, providing for interoperability between the university student information system and DHS SEVIS without disrupting existing university information processing protocol and computer system design.¹¹⁶

The business end of the technology conversion requires elaborate planning and precision execution. First, one must determine the institutional ownership of SEVIS, particularly its organizational structure and reporting line.¹¹⁷ Without ownership the change process will not materialize. Lacking reporting protocol, there would be no control. Second, one must decide whether to buy or upgrade computer hardware and software and seek the necessary approval for this decision.¹¹⁸ Third, one must identify a vendor and purchase, install, and test the software

complicated tasking, complex coordination and delicate negotiation within (and without) the university. It required a committed reformer, dedicated administrator, seasoned manager, and shrewd politician, willing to invest untold hours of efforts and tens of thousands of resources.). See Bell, *supra* 31.

116. See Newfront Software, *SEVIS Readiness Workshop*, <http://www.newfrontsoftware.com/sevis/docs/SRW-SanAntonio.ppt> (2002). For an actual implementation plan, see Greg Leonard, *Planning and Implementation Design Student and Exchange Visitor Program*, <http://www.newfrontsoftware.com/sevis/docs/Planning%20and%20Implementation%20Design.pdf> (Feb. 22, 2002).

117. Ltr. from Mark Olson, Senior Vice Pres., Natl. Assn. of College & U. Bus., to Dir., Regs. & Forms Servs. Div., Immig. & Naturalization Serv., *To INS Re: SEVIS* (June 17, 2002) (available at <http://www.nacubo.org/x576.xml>).

118. *Id.*

and hardware.¹¹⁹ Fourth, the interface with other related databases must be implemented.¹²⁰ Next, university staff from departments such as admissions, international services, registrar, payroll, human services, IT, and others must be trained on SEVIS functions and use. These staff members must speak the same language and function at the same level and operation. Fifth, the academic advising process must be realigned by designing internal forms and training academic deans and staff on SEVIS requirements.¹²¹ Sixth and finally, SEVIS data collection forms must be designed and initial data conversion must be performed.¹²²

C. SEVIS Is Costly to Install

As SEVIS end users, international departments and exchange programs are responsible for the input, update and maintenance of *all* incoming students and scholars found in the United States by January 30, 2003. In 2003, the total number of J-1 students and J-1 scholars (excluding dependents) to be tracked was 869,118, of which 353,342 were new students and 515,776 were continuing students.¹²³ According to some schools, it usually takes thirty to sixty minutes to input one student record.¹²⁴ At that rate it would require 434, 559 man hours or 54,319 man days (assuming an eight hour shift), excluding computer downtime and staff human error, to input all the student records into the SEVIS system. Take the example of the University of Southern California (USC) in the year 2003. In that year USC had 6,270 international students and 1,214 visiting scholars in attendance.¹²⁵ This made for 7,484 international students/scholars to be processed and monitored.¹²⁶ In order for USC to

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. See NGLU 2003-12-a, *supra* n. 75, at 17. "Update on SEVIS Statistics."

124. The time it took to process SEVIS records and papers differed from institution to institution. The difference depended as much on sophistication and maturity of technology, as it did on the experience and competence of the input staff. The INS cost estimate was based on thirty-one minutes for each student record. The University of Georgia reported thirty minutes in processing one document. Kate Carter, *Implementing Tracking System Frustrating: UGA's Foreign Exchange Students*, http://www.onlineathens.com/stories/040903/uga_20030409041.shtml (Apr. 8, 2003).

125. IIE Network, *Open Doors 2003: Institutions with 1,000 or More International Students, 2002/03 Ranked by International Student Totals*, <http://opendoors.iienetwork.org/?p=35937> (Nov. 2003) (reporting foreign student enrollment data extracted from IIE Open Doors) [hereinafter IIE Network, *Open Doors 2003*]; IIE Network, *Table 40: Institutions Hosting the Most International Scholars, 2001/02 & 2002/03*, <http://opendoors.iienetwork.org/?p=37195> (Nov. 2003) (reporting foreign student enrollment data extracted from IIE Open Doors) [hereinafter IIE Network, *Table 40*].

126. *Id.*

be in compliance with the USA PATRIOT Act, it had to spend 3,717 DOS hours (assuming thirty minutes per record) to input 7,487 student/scholar records into SEVIS by August 2003.¹²⁷ This amounted to 92.9 students per five DOS working days (assuming an eight hour day).¹²⁸ This also assumed that the DOS had no other assignment to do for the international office he/she attached (e.g. processing applications and counseling students), an unrealistic scenario, especially during enrollment season when all foreign students and visitors were required to be entered into the system. The estimate also did not take into account SEVIS shutoff or computer downtime.¹²⁹

The estimated extra workload for the nation's universities to come into compliance with the SEVIS program is summarized in the following two tables.

127. *Id.*

128. *Id.*

129. *Id.*

Table 2: Estimated SEVIS Data Input Time for International Students:
Top Forty Research Institutions, 2002/2003¹³⁰

RANK	INSTITUTION	CITY	STATE	TOTAL: INT'L STUDENTS*	TOTAL: SEVIS DSO HOURS (DAYS)**
1	U. Southern California	Los Angeles	CA	6,270	3,135 (78.4)
2	New York University	New York	NY	5,454	2,727 (68.2)
3	Columbia University	New York	NY	5,148	2,574 (64.3)
4	Purdue U. – Main Campus	West Lafayette	IN	5,105	2,554 (63.8)
5	U. Texas at Austin	Austin	TX	4,926	2,464 (61.6)
6	U. of Michigan – Ann Arbor	Ann Arbor	MI	4,601	2,300 (57.5)
7	U. of Illinois at Urbana-Champaign	Champaign	IL	4,555	2,277 (56.9)
8	Boston U.	Boston	MA	4,518	2,258 (56.4)
9	U. of Wisconsin – Madison	Madison	WI	4,396	2,198 (54.95)
10	The Ohio State U. – Main Campus	Columbus	OH	4,334	2,167 (54.2)
11	U. of California – Los Angeles	Los Angeles	CA	3,927	1,963 (79.1)
12	U. of Pennsylvania	Philadelphia	PA	3,856	2,928 (73.2)
13	U. of Maryland College Park	College Park	MD	3,734	1,867 (46.7)
14	Texas A&M U.	College Station	TX	3,702	1,851 (46.27)
15	Penn State U. Park	University Park	PA	3,681	1,840 (46.0)
16	SUNY at Buffalo	Buffalo	NY	3,628	1,814 (43.3)
17	University of Florida	Gainesville	FL	3,547	1,773 (44.3)
18	Indiana U. at Bloomington	Bloomington	IN	3,495	1,747 (43.7)
19	Harvard U.	Cambridge	MA	3,459	1,729 (43.2)
20	U. of Houston	Houston	TX	3,358	1,679 (42.0)
21	U. of Minnesota – Twin Cities	Minneapolis	MN	3,351	1,675 (41.9)
22	Arizona State U. Main	Tempe	AZ	3,268	1,634 (40.8)
23	Wayne State U.	Detroit	MI	3,224	1,612 (40.3)
24	Michigan State U.	East Lansing	MI	3,202	1,601 (40.0)
25	Cornell U.	Ithaca	NY	3,096	1,548 (38.7)
26	U. of Arizona	Tucson	AZ	3,011	1,505 (37.6)
27	Stanford U.	Stanford	CA	2,991	1,495 (37.4)
28	U. of Illinois at Chicago	Chicago	IL	2,950	1,475 (36.9)
29	U. of Washington	Seattle	WA	2,908	1,454 (36.3)
30	Rutgers U. - New Brunswick	New Brunswick	NJ	2,906	1,453 (36.3)
31	M.I.T.	Cambridge	MA	2,819	1,409 (35.2)

130. IIE Network, *Open Doors 2003*, *supra* n. 125 (reporting foreign student enrollment data extracted from IIE Open Doors).

RANK	INSTITUTION	CITY	STATE	TOTAL: INT'L STUDENTS*	TOTAL: SEVIS DSO HOURS (DAYS)**
32	Georgia Institute of Tech	Atlanta	GA	2,798	1,354 (33.9)
33	U. of California – Berkeley	Berkeley	CA	2,739	1,369 (34.2)
34	U. of Chicago	Chicago	IL	2,554	1,277 (31.9)
35	Carnegie Mellon U.	Pittsburgh	PA	2,534	1,267 (31.7)
36	Iowa State U.	Ames	IA	2,387	1,193 (29.8)
37	Oklahoma State U. Main Campus	Stillwater	OK	2,321	1,160 (29.0)
38	Northeastern U.	Boston	MA	2,282	1,141 (28.5)
39	SUNY at Stony Brook	Stony Brook	NY	2,233	1,116 (27.9)
40	U. of South Florida	Tampa	FL	2,197	1,098 (27.4)

* Does not include exchange visitors/scholars

** DOS Day = 8 hrs. x 5 DSO = 40 DSO day

Table 3: Estimated SEVIS Data Input Time for International Scholars: Institutions Hosting the Most International Scholars,* 2002/2003¹³¹

RANK	INSTITUTION	CITY	STATE	2002/03	DSO Hours	DOS Days **
1	Harvard U.	Cambridge	MA	2,403	1,201	30.0
2	U. of California – Berkeley	Berkeley	CA	2,365	1,182	29.6
3	U. of California – Los Angeles	Los Angeles	CA	2,098	1,049	16.22
4	U. of Pennsylvania	Philadelphia	PA	2,082	1,041	26.0
5	Columbia U.	New York	NY	1,890	945	23.6
6	U. of California – San Diego	La Jolla	CA	1,817	908	22.7
7	U. of Illinois at Urbana-Champaign	Champaign	IL	1,694	847	21.2
8	Yale U.	New Haven	CT	1,637	818	20.5
9	U. of California – San Francisco	San Francisco	CA	1,600	800	20
10	Massachusetts Institute of Tech.	Cambridge	MA	1,573	786	19.7
11	U. of Washington	Seattle	WA	1,556	778	19.4
12	The Ohio State U. Main Campus	Columbus	OH	1,423	711	17.8
13	U. of Michigan – Ann Arbor	Ann Arbor	MI	1,342	671	16.77
14	U. of Florida	Gainesville	FL	1,335	667	16.7
15	U. of Minnesota – Twin Cities	Minneapolis	MN	1,252	626	15.6
16	Washington U.	St. Louis	MO	1,246	623	15.6
17	Cornell U.	Ithaca	NY	1,236	618	15.4
18	U. of Southern California	Los Angeles	CA	1,214	607	15.2

131. IIE Network, *Table 40, supra* n. 125 (reporting foreign student enrollment data extracted from IIE Open Doors).

RANK	INSTITUTION	CITY	STATE	2002/03	DSO Hours	DOS Days **
19	U. of Wisconsin – Madison	Madison	WI	1,131	565	14.1
20	Duke U., Med. Center, & Health System	Durham	NC	1,117	558	14.0
21	U. of California – Davis	Davis	CA	1,109	554	13.9
22	Penn State U. Park	University Park	PA	1,080	540	13.5
23	U. of North Carolina at Chapel Hill	Chapel Hill	NC	1,024	512	12.8
24	U. of Texas at Austin	Austin	TX	1,013	506	12.6
25	Boston U.	Boston	MA	975	487	12.2
26	Michigan State U.	East Lansing	MI	910	455	11.4
27	U. of Illinois at Chicago	Chicago	IL	900	450	11.2
28	Emory U.	Atlanta	GA	868	434	10.8
29	U. of Iowa	Iowa City	IA	865	432	10.8
30	U. of Maryland College Park	College Park	MD	861	430	10.7

* Does not include international students.

** DOS Day = 8 hrs. x 5 DSO = 40 DSO day

After public consultation, it has been estimated the one-time SEVIS compliance cost to be \$4,680,000 computed as follows:

Table 3.1: Continuing Student Reporting Burden¹³²

Number of Continuing Students	625,000
Number of Continuing Exchange Visitors	275,000
Number of Responses per Respondent	1
Hours per Response	0.52*
Total One-Time Reporting Burden	468,000
Total Public Cost	\$4,680,000**

(a) * Time for Processing SEVIS Records¹³³

ACTIVITY	TIME (MINUTES)
Learning about the Law and the Program	1
Data Collection and Input	30
Total per Response	31 (0.52 hours)

The INS estimations did not come close to the actual time spent by

132. 67 Fed. Reg. at 76268 (Dec. 11, 2002) (“estimate based upon the amount of time it would take to complete a Form I-20 in order to enter a continuing student in SEVIS”).

133. *Id.* (“estimate is based upon the amount of time it would take to complete a SEVIS Form I-20”).

universities in setting up the SEVIS system.¹³⁴ The estimations failed for a number of reasons. First and foremost, the estimations were based on a “time and motion” kind of analytical exercise, which failed to take into account real life conditions in the field.¹³⁵ Universities are not all alike in experiences, resources, and capacities in dealing with SEVIS. Each student recording process is different.¹³⁶

The INS estimates did not make explicit the types of schools for which the estimation was meant to apply.¹³⁷ As an aggregate and average, the estimation “appeared” to have some face validity. The validity and usefulness of the estimates (i.e. thirty minutes per record and \$4.68 millions for all schools) depended on variations amongst schools, for instance, big versus small, differences between records (old versus recent records), and disparity in all sort of situations, such as summer versus fall terms.¹³⁸

The estimation had little predictive value and was not useful for the schools in planning their activities. First of all, as a methodological proposition, the INS failed to specify the range and differences between each student entry.¹³⁹ If the range was great, for example, from five minutes to sixty minutes, and was contingent on specific school or particular student or even a unique situation and set of circumstances, the average was of very little use, except perhaps for aggregate level policy analysis, i.e. how much it cost to move from a paper based system to an electronic one.

Second, the INS has failed to articulate its underlying assumptions in estimating the time and cost per student record processed.¹⁴⁰ Specifically, it failed to make clear what the average school or average record looked like.¹⁴¹ Without this key information, the estimation was of little use for planning purpose, individually or collectively. For example, if an average time of thirty minutes is allotted for each record entry in a major university with three thousand foreign students/visitors, the smaller schools with few foreign students have little reason to use the estimate as their own. The thirty-minute research school estimate also should not be used as a base to calculate the total time for all schools involved.¹⁴²

134. Carter, *supra* n. 124

135. *Id.*

136. *See supra* nn. 130-132 and accompanying text.

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.*

The time it takes to process a student record hinges on a number of factors including: (1) existence of paper records; (2) completeness of paper records; (3) accessibility of paper records; (4) familiarity with university databases; (5) familiarity with university IT technology; (6) familiarity with INS–SEVIS technology; (7) familiarity with INS laws and regulations; (8) stability university SEVIS technology; (9) reliability of SEVIS technology at INS; (10) availability of SEVIS work station; and (11) competency of SEVIS staff.¹⁴³ If one or more of these factors is not met, substantial delay might occur, and in fact did occur!¹⁴⁴

D. SEVIS Is Costly to Operate

The SEVIS system was not only burdensome to set up, it is also costly to operate and maintain. Congress allotted a one-time funding of \$36.8 million for setting up the SEVIS system. The seed funding, however, did not include support for ongoing maintenance and routine operational costs at the universities. The USA PATRIOT Act called for students and visitors to pay a SEVIS fee before they were ever granted a visa. SEVIS community users are responsible for its upkeep and administration. In order to be certified, SEVIS schools have to pay \$580 comprising \$230 for I-17 petition of approval and \$350 for on-site review before a school can accept F-1 students.¹⁴⁵ In order to set up SEVIS, each school is required to pay out \$30,000 to \$50,000 for software and hardware.¹⁴⁶

The cost of implementing and operating SEVIS differs according to the type of school and program. Factors include whether the school is a university or a vocational college, whether distance learning is involved, and the size of the school's student body. The basic implementation costs include software, hardware, dedicated SEVIS IT staff and DSOs. As illustrated in Table 4 below, the costs of implementing SEVIS differed from institution to institution and depended on the size of the foreign student population.¹⁴⁷ With campuses of one hundred students or less, the estimated cost of implementing SEVIS is between \$5,000 and \$100,000 for 73 percent of the participating schools.¹⁴⁸ However, when

143. *See id.*

144. *See Ltr., supra* n. 117.

145. 66 Fed. Reg. 65811, 65814. (Dec. 21, 2001). Federal guidelines require that the full cost of providing immigration and naturalization services must be recovered through fees and therefore cannot be supported by tax dollars. *Id.* at 65811–65813.

146. Patty Croom, *Comments on SEVIS Compliance Dates and Costs*, <http://web.archive.org/web/20030815140430/http://ias.berkeley.edu/siss/hurricane/sissworkingpapers/workingpapersixbycroom5-23-02.pdf> (May 20, 2002).

147. *See Ltr., supra* n. 117.

148. *Id.*

there are more than 2,500 foreign students, the majority (56.2 percent) estimate that they will have to spend between \$100,000 and \$249,999 to make SEVIS operational on campus.¹⁴⁹ Only six percent reported that they will spend less than \$5,000 in meeting implementation needs.¹⁵⁰

Ultimately both the campus with few foreign students (e.g. small research universities, large teaching colleges, ESL and vocational programs) and those with many research students and exchange scholars (research universities), had a critical decision to make: could they afford to accept foreign students or sponsor exchange scholars anymore given the SEVIS “surcharge”? The SEVIS costs hit profit-driven vocational schools particularly hard. It is more difficult to justify the initial capital outlay and continued maintenance costs when foreign student enrollment is less than ten students. Since foreign students are not a major income stream for these schools, they might choose to opt out of international education altogether. This is particularly the case when the price of non-compliance is potential criminal liability.

Table 4: Estimated cost of SEVIS implementation as a function of size of campus foreign student population¹⁵¹

ESTIMATED COST OF SEVIS IMPLEMENTATION	CAMPUS FOREIGN STUDENTS POPULATION				
	Less than 100	100 – 499	500 – 999	1,000 – 2,499	More than 2,500
Less than \$5000	73%	30%	8.7%	3.8%	6.0%
\$5000 - \$24,000	23.4%	50%	17.3%	19.2%	
\$24,000 - \$99,999	3.1%	16.6%	56.5%	57.7%	18.7%
\$100,000 - \$249,999	NA	3.3%	17.4%	15.4%	56.2%
\$250,000 - \$499,999	NA	NA	NA	3.8%	6.0%
More than \$499,999	NA	NA	NA	NA	12.5%

149. *Id.*

150. *Id.*

151. *Id.*

The INS has estimated the annual SEVIS operational costs to be:

Table 5: INS Estimated SEVIS Reporting Cost Burden¹⁵²

ACTIVITIES	TIME (MINUTES)
Learning about the Law and the Program	10
Data collection and Updates	5
Adjudication, notification, reports	5
Total minutes per Response	20
Total Public Cost.	\$14,985,000

Different universities dealt with the funding of SEVIS differently. The University of Chicago proposed to charge all foreign students \$25 per quarter to enroll.¹⁵³ The University of Georgia charged \$50 to offset \$150,000 of SEVIS costs as of April 2002.¹⁵⁴ The University of Wisconsin-Madison first imposed a SEVIS fee on foreign students and backed down when confronted with student protests and a city council objection.¹⁵⁵ Iowa State University decided to absorb the SEVIS costs itself.¹⁵⁶

The cost of implementing the SEVIS system at universities is often a heavy burden on universities. For example, the cost for putting SEVIS into operation at Iowa State was \$24,000, including \$10,800 for software and \$7,000 for a computer server that holds the information plus a \$5,000 fee for the use of a commercial software database and Administrative Technology Services hired four SEVIS technicians.¹⁵⁷

152. 67 Fed. Reg. at 76268 (“estimate is based upon the amount of time it would take to complete a SEVIS Form I-20”).

153. U. of Chi., *No Surveillance Fee at the University of Chicago*, <http://www.math.uchicago.edu/~johann/fee/> (accessed Apr. 14, 2006).

154. Kimberly Bowers, *New SEVIS Fees Anger Intl. Students*, Redandblack.com (U. of Ga. student newspaper) (Nov. 26, 2002), http://www.redandblack.com/vnews/display.v/ART/2002/11/26/3de3a5b5e0779?in_archive=1.

155. U. of Wis.–Madison, *Chancellor’s Statement Regarding SEVIS Funding*, <http://www.chancellor.wisc.edu/sevis.html> (last updated Nov. 20, 2006). In April, the University of Wisconsin-Madison announced a plan to charge foreign students \$50 a semester (\$25 summer) to support the SEVIS operational cost, projected to be \$330,000 per year. The decision was based on the fact the university could not fund the \$330,000 and that considered best for end-users of SEVIS to pay. *Id.*

156. Eric Rowley, *ISU Ahead of Game—No SEVIS Fees for International Students*, *Looming Budget Cuts Could Prompt Tracking Fee*, Iowa St. Daily 5 (Oct. 28, 2003), <http://www.iowastatedaily.com/media/storage/paper818/news/2003/10/28/News/Isu-Ahead.Of.Game.No.Sevis.Fees.For.International.Students-1097374.shtml>.

157. *Id.*

Charging students was met with protests, resistance, and legal action nationwide, such as at the University of Wisconsin – Madison. On April 1, 2003 the university proposed to charge international students a \$100 to \$125 SEVIS fee (\$50 per semester and \$25 for the summer).¹⁵⁸ The students protested.¹⁵⁹ The Teaching Assistants' Association at the University of Wisconsin-Madison worked with the students, faculty, administrative staff, and departments to challenge the appropriateness of the fees on equity grounds. They argued that foreign students should not be singled out.¹⁶⁰ On May 7, 2003, the administration decided to temporarily suspend the \$125 SEVIS fee to further study the issue. On May 16, 2003, the Madison, Wisconsin, City Council passed a resolution objecting to a SEVIS fee for international students.¹⁶¹ The chancellor's SEVIS Fee Advisory Committee recommended against charging the foreign students:

The committee therefore respectfully recommends to the chancellor that the administrative costs of SEVIS be absorbed as part of the necessary institutional costs of fulfilling our academic mission, and as such, should therefore ideally be covered by the usual sources of funding for administrative costs, namely [general public revenue] and tuition.¹⁶²

On September 9, 2003, UW-M chancellor Wiley decided to adopt the recommendation of the Advisory Committee and absorb the SEVIS costs as a general administration charge.¹⁶³

At Binghamton University in New York, the Graduate Student Organization decided to file suit against the University for charging SEVIS fees, arguing that the fees discriminated against foreign

158. U. of Wis. –Madison, *supra* n. 155.

159. Rachek Alkon, *Students Oppose SEVIS Cost*, Badger Herald (U. of Wis.–Madison student newspaper) (Apr. 30, 2003), http://badgerherald.com/news/2003/04/30/students_oppose_sevi.php. The Teaching Assistants Association at the University of Wisconsin–Madison organized a protest against the University charging \$100 to \$125 SEVIS fees. The fees were considered to be discriminatory. *Id.*

160. See Am. Fedn. Of Teachers, *TAA Persuades UW–Madison To Withdraw SEVIS Fee*, http://www.aft.org/higher_ed/news/2003/taa_withdraw.htm (accessed Apr. 17, 2006).

161. Nikki Woodworth, *Council takes stand against SEVIS*, Badger Herald (U. of Wis.–Madison student newspaper) (May 7, 2003), http://badgerherald.com/news/2003/05/07/council_takes_stand_php (stating that the Madison City Council voted on May 6, 2003 to “defend the equal protection of international students” and denounced the proposed imposition of SEVIS fees on international students.)

162. Matthew Dolbey, *Chancellor Rules on SEVIS Fee*, Badger Herald (U. of Wis.–Madison student newspaper) (Aug. 29, 2003), http://badgerherald.com/news/2003/08/29/chancellor_rules_on_php.

163. U. of Wis. –Madison, *University to Cover Future Sevis Costs*, <http://www.news.wisc.edu/8886.html> (Sept. 9, 2003).

students.¹⁶⁴ The Graduate Student Organization filed a lawsuit against Binghamton University because they believe a fee imposed only on international students is discriminatory.¹⁶⁵ Thus, universities have encountered numerous obstacles in determining how to pay SEVIS fees while not appearing discriminatory against foreign students.

E. SEVIS Fee Disputes

The IIRIRA of 1996 authorized schools to collect fees of not more than \$100 to implement the IIRIRA mandate.¹⁶⁶ In February of 2000, the INS proposed to set the fees at \$95,¹⁶⁷ but experienced strong oppositions from universities¹⁶⁸ and lawmakers alike.¹⁶⁹

On October 31, 2000, the President signed H.R. 3767, the Visa Waiver Permanent Program Act. Section 404 of this law amended sections 641(d)-(h) of the IIRIRA, by requiring the Attorney General (rather than the colleges and universities) to collect a CIPRIS fee from students in the F, J, or M visa categories. The Attorney General has since set the fees at \$100.¹⁷⁰ This proposed fee was earmarked for CIPRIS related personnel, operations, maintenance, training, and other program costs. It would also support sixty-one SEVIS liaison officers and 182 other ICE officers in the field.¹⁷¹ The collection of SEVIS student fees raised two concerns with higher education administrators and educators:¹⁷² the reasonableness of the fee amount¹⁷³ and the

164. Liza Schwartz, *Administration is Sued for Foreign-Student Fee*, LXV Pipe Dream (Binghamton U. student newspaper) 10, ¶ 1 (Oct. 17, 2003), <http://www.bupipedream.com/101703/news/n2.htm>.

165. *Id.*

166. *Authorizing Collection of the Fee Levied on F, J, and M Nonimmigrant Classifications Under Public Law 104-208*, 64 Fed. Reg. 71323, 71325 (Dec. 21, 1999) (proposed rule stating that a fee of \$95 was proposed to support SEVIS implementation, maintenance and operations).

167. *Id.* at 71324–71325.

168. Ltr., *supra* n. 38 (opposing fees collection procedure under then under the Coordinated Interagency Partnership Regulating International Students (CIPRIS) program as being “substantial and costly workload burden on all colleges and universities and exchange visitor programs”).

169. In a letter from Attorney General, John Ashcroft, then a senator, and twenty other senators, including Edward M. Kennedy (D-Mass.), Trent Lott (R-Miss.) and Patrick J. Leahy (D-Vt.), objected, stating that “requiring U.S. institutions to collect fees to fund a federal program is an inappropriate role for higher education institutions.” Dan Eggen & Cheryl W. Thompson, *INS to Monitor Foreign Students Ashcroft Reverses Stance on System*, Wash. Post A10 (May 11, 2002).

170. See 68 Fed. Reg. 61148 (Oct. 27, 2003).

171. See 68 Fed. Reg. at 61151.

172. See Ltr. from Betty McCollum, Rep. 4th Dist. Minn., et al., to Tom Ridge, Sec. of Homeland Sec., & Colin Powell, Sec. of St. (Dec. 19, 2003) (available at http://www.nafsa.org/_/Document/_/rep.pdf) (expressing concerns with the SEVIS fee amount and process; the \$100 fees and collection process would have an adverse impact on student enrollment).

173. 68 Fed. Reg. at 61151 (reporting that 4,617 comments were received regarding the 1999

appropriateness of the fee collection process.¹⁷⁴

1. Legislative Mandate

On December 21, 1999, INS published proposed rule “Authorizing Collection of the Fee Levied on F, J, and M Nonimmigrant Classifications under Public Law 104-208” seeking public consultation.¹⁷⁵ The proposed rule called for the collection and remission of \$95 visa applications fees for F-1,¹⁷⁶ J-1,¹⁷⁷ or M-1¹⁷⁸ nonimmigrants who first register or enroll in school or first commence an exchange program in the United States. The proposed rule implemented the mandate set forth in Section 641 of the IIRIRA of 1996.¹⁷⁹

Section 641(a)(1) of the IIRIRA directed the Attorney General, in consultation with the Secretaries of State and Education, to develop and conduct a program to collect information on nonimmigrant foreign students and exchange visitors. Section 641(e) of the IIRIRA authorized the INS to collect a fee of no more than \$100 from each F-1, M-1 and J-1 visa applicant to fund the information collection process. The proposed rule was also authorized by Congress under 31 U.S.C. § 9701 (2000),

proposed Section 641 SEVIS fees collection rule and that many suggested that the fee of \$95 was excessive, especially for short term visitors and third world students).

174. Ltr. from David Ward, Pres., Am. Council on Educ., to Asa Hutchinson, Off. of the Under Sec., Dept. of Homeland Sec., *Letter to the Department of Homeland Security Regarding SEVIS Fees* (Sep. 2, 2003) (available at <http://www.acenet.edu/AM/PrinterTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=4024> (letter on behalf of American Council on Education and six other higher education associations stating that SEVIS fees should be collected just like any other visa fees which would make the SEVIS a truly paperless “integrated, all-electronic system”).

175. 64 Fed. Reg. at 71323–71331.

176. “F-1 nonimmigrants are foreign nationals enrolled as students in service-approved colleges, universities, seminaries, conservatories, academic high schools, private elementary schools, other academic institutions, and in language training programs in the United States. An F-2 nonimmigrant is a foreign national who is the spouse or qualifying child of an F-1 student.” *Id.* at 71324.

177. “J-1 nonimmigrants are foreign nationals who have been selected by a U.S. Information Agency (USIA) designated sponsor to participate in an exchange visitor program in the United States. A J-2 nonimmigrant is a foreign national who is the spouse or qualifying child of a J-1 exchange visitor.” *Id.* at 71324.

178. “M-1 nonimmigrants are foreign nationals enrolled as students in Service-approved vocational or other recognized nonacademic institutions, other than in language training programs in the United States. An M-2 nonimmigrant is a foreign national who is the spouse or qualifying child of an M-1 nonimmigrant.” *Id.* at 71324.

179. The IIRIRA, Pub. L. 104-208 (Sept. 30, 1996), was codified as 8 U.S.C. § 1372 (2002). Section 641(a)(1) of the IIRIRA, in particular, directed the Attorney General, in consultation with the Secretary of State and the Secretary of Education, to develop and conduct a program to collect information on nonimmigrant foreign students and exchange visitors from approved institutions of higher education and designated exchange visitor programs. Pub. L. 104-208, at § 641(a)(1).

which required all federal agencies to recover costs and benefits conferred by federal actions (in this case, the execution of Sections 103 and 214 of the Immigration and Naturalization Act).¹⁸⁰ Under Section 9701, the fees and charges were to be calculated based on “the costs to the Government” or “the value of the service or thing to the recipient” or “public policy or interest served.” As applied:

The proposed fee was calculated based on the program and system costs and the estimated population base of covered fee payers. The calculated costs include those expenses incurred by the Government to develop, produce, deploy, operate, and maintain the program and system. In addition, the proposed fee will cover the costs associated with the creation and population of new positions required to support this program. The revenue from the proposed fee will also cover the costs of technical and program support that the Government needs to administer benefits and to monitor schools, program sponsors, students, and exchange visitors solely for the purpose of this reporting program. In addition, a portion of the revenue from the proposed fee will be used for the direct support of Service operations relating to student and exchange visitor-related activities.¹⁸¹

2. SEVIS Fees and Charges

The fees and charges under the proposed rule include both “nonrecurring costs” and “recurring costs.”¹⁸² “Nonrecurring Costs” were assessed at \$12.3 million.¹⁸³ This covered development and deployment costs for SEVIS implementation. Development costs included those associated with the design and development of an Internet-based, electronic information data collection system, including system design, development, integration, testing, verification and validation.¹⁸⁴ Deployment costs included installation of the new electronic system in the INS and DOS HQ and field offices.¹⁸⁵

“Recurring Costs” were estimated to be \$31 million from October 1, 1999 through September 30, 2001.¹⁸⁶ These costs were designated to pay

180. 31 U.S.C. § 9701(b) (2000) (“Fees and charges for Government services and things of value” provides in pertinent part: “The head of each agency... may prescribe regulations establishing the charge for a service or thing of value provided by the agency.” The fees and charges are to be calculated based on “the costs to the Government”; “the value of the service or thing to the recipient”; or public policy or interest served.”).

181. 64 Fed. Reg. at 71325.

182. *Id.*

183. *Id.*

184. *Id.* at 71325–71326.

185. *Id.* at 71326.

186. *Id.*

for the personnel costs of supportive staff at the INS and DOS, such as service field offices, and Help Desk staff.¹⁸⁷ These costs were also set aside to pay for system operations and maintenance (O&M) costs, such as server maintenance and beta testing.¹⁸⁸ Finally, these costs were to pay for management and administrative (M&A) costs such as planning and administration. The user base for cost and fees calculation was estimated at 251,000 in both fiscal year 2000 and fiscal year 2001.¹⁸⁹ The total projected population for this two-year period was estimated at 501,000 paying students and exchange visitors.¹⁹⁰

3. *Universities and Schools' Objections*

The proposal was strongly objected to by university administrators. The comments received were universally negative ones. There were a total of 4,617 comments received. Three types of comments were the most prominent: the fee should not be charged at all, the fee was too excessive, and the fee should not be collected by the schools. For example, the National Association of State Universities and Land-Grant Colleges (NASULGC) strongly opposed the fee collection process as proposed by the INS for two reasons.¹⁹¹ First, the fee collection system imposed extra legal responsibilities on the schools.¹⁹² It rendered school administrators de facto designated federal regulators, enforcers and collection agents. Such a fee collection system was inefficient and at odds with the spirit of the Paperwork Reduction Act. Second, the electronic information collection system was also an unfunded mandate contrary to Unfunded Mandates Reform Act of 1995 and an illegal infringement of state laws and regulations.¹⁹³

The American Association of Collegiate Registrars and Admissions Officers (AACRAO), while supportive of the goals of the CIPRIS project, nevertheless objected to the proposed federal regulation on substantive and technical grounds.¹⁹⁴ Substantively the proposed rule set a bad

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. Ltr. from Peter Magrath, Pres. Nat. Assoc. of St. U. & Land-Grant Colleges, to Dir., Policy Directives & Instrs. Branch, Immig. & Naturalization Serv., *Re: Proposed Rule (INS No. 1991-99), Authorizing Collection of the Fee Levied on F, J, and M Nonimmigrant Classifications Under Public Law 104-208* (Jan. 24, 2000) (available at http://www.nasulgc.org/Washington_Watch/Letters2000/FR_Coord_Interagency_Partnership_regulat_Int'l.Stud.htm).

192. *Id.*

193. *Id.*

194. Ltr. from Jerome Sullivan, Exec. Dir., Am. Assn. of Collegiate Registrars & Collegiate Officers, to Dir., Policy Directives & Instrs. Branch, Immig. & Naturalization Serv., *Re: Proposed Rule*

precedent in allowing federal agencies to shift regulatory duties and responsibilities onto universities and colleges by effectively making them a collection agent for the federal government.¹⁹⁵ Second, the proposed regulation compromised the role of international educational advisors by making them hated federal law enforcers, instead of trusted educational counselors.¹⁹⁶ Third, a decentralized college-based fee collection system was not the most efficient way to collect fees.¹⁹⁷ Fourth, the operational cost and compliance burden associated with fee collections on behalf of the INS was an unfunded federal mandate prohibited by law, which also compromised university's major mission and function.¹⁹⁸ Finally, the proposed fee collection process would create significant financial and legal liabilities for institutions in the form of law suits based on mistakes in the handling of student fees.¹⁹⁹

Technically, the INS violated the SEVIS enabling legislation, Section 641 of the IIRIRA in a number of ways. First, Section 641(e)(1)(A) of the IIRIRA clearly requires F-1 and M-1 students to pay a fee "when the alien first registers with the institution or program after entering the United States."²⁰⁰ The proposed regulatory amendments to 8 CFR § 214.2(f)(17)(iv) and (m)(18)(iv) however imposed a fee on F-1 and M-1 nonimmigrants who began a new program at the same institution.²⁰¹ This was illegal and was not intended by the law or within the contemplation of the legislators.

Second, section 641(e)(4)(A) of the IIRIRA requires the Attorney General to set the fee on the basis of estimated cost for collecting information.²⁰² Inasmuch as the INS proposed the fee amount of \$95 based on erroneous computations which included foreign student transferring within the same institution, the fee estimation was erroneous.²⁰³

Third, section 641(e)(4)(B) of the IIRIRA limits the use of the fees for international student and exchange visitor tracking system activities.²⁰⁴ It

(INS No. 1991-99) *Authorizing Collection of the Fee Levied on F, J, and M Nonimmigrant Classifications Under Public Law 104-208* (Feb. 22, 2000) (available at http://www.aacrao.org/federal_relations/cipris/comments.cfm).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Pub. L. 104-208 at § 641(e)(1)(A).

201. 64 Fed. Reg. at 71329-71330.

202. Pub. L. 104-208 at § 641(e)(4)(A).

203. 64 Fed. Reg. at 71325.

204. Pub. L. 104-208 at § 641(e)(4)(B).

does not allow INS to charge fees for “operations relating to student and exchange visitor-related activities” in general.²⁰⁵

Fourth, the proposed regulation requires F-1, J-1 and M-1 nonimmigrants to pay a fee for entering a program of study “on or after August 1, 1999.”²⁰⁶ This retroactive collection of fees is not allowed by section 641 of the IIRIRA.²⁰⁷

Fifth, the proposed regulation provided that “[f]ailure by the school to impose, collect and remit the fee is conduct that does not comply with Service regulations.”²⁰⁸ Section 641 of the IIRIRA required the school to impose and collect fees.²⁰⁹ It did not require the schools to remit the fees when international students failed to do so. The university administrators and educators associations should not have been made responsible for the students/visitors mistakes.

Public comments and political pressure resulted in substantial modification to the original proposal, particularly with respect to the fee collection and remittance process. The American Council on Education (ACE) was also supportive of SEVIS but objected to its implementations.²¹⁰

On October 27, 2003, the DHS published a new proposed rule, “Authorizing Collection of the Fee Levied on F, J, and M Nonimmigrant Classifications Under Public Law 104-208” for public comment.²¹¹ The new proposed rule was required as a result of the establishment of the DHS and the merging of the INS functions into the Border Coordination Initiative (BCI) and ICE. The new proposed regulations addressed many of the concerns raised by the comments to the original INS regulations. There were significant differences between the INS Proposed Rule (1999) and the DHS Proposed Rule (2003): (1) DHS proposed to charge \$100²¹² instead of \$95 for operating and maintaining SEVIS, except for au pairs,

205. 64 Fed. Reg. at 71325.

206. 64 Fed. Reg. at 71326.

207. Pub. L. 104-208 at § 641.

208. 64 Fed. Reg. at 71329.

209. Pub. L. 104-208 at § 641(e).

210. Ltr. from David Ward, Pres., Am. Council on Educ., to Dir., Regs. & Forms Serv. Div., Dept. of Homeland Sec., RE: *Comments on Proposed Rule: “Authorizing Collection of the Fee Levied on F, J, and M Nonimmigrant Classifications Under Public Law 104-208” ICE No. 2297-03 (RIN 1653-AA23)* (Dec. 10, 2003) (available at <http://www.acenet.edu/AM/Template.cfm?Section=Search&template=/CM/HTML.Display.cfm&ContentID=6301>).

211. 68 Fed. Reg. 61148 (2003).

212. *Id.* at 61149. DHS undertook to retain KPMG to conduct a new fee review for full compliance with federal law and fee guideline. The fee review was based on the recovery of costs over the FY 2003/2004 time period, having regard to the USA PATRIOT Act SEVIS appropriation of \$36.8 million. It included costs incurred for increase DHS staffing and training dedicated to SEVIS related functions in DHS HQ, field offices and Help Desks. *Id.* at 61151.

camp counselors, or participants in a summer work/travel program for whom the fee would be \$35; (2) DHS would be charge the fees directly, instead of requiring schools to handle the fees; (3) DHS exempted from fee payment those aliens who initially paid a SEVIS fee and applied for an F-1, F-3, J-1, M-1, or M-3 visa, but were denied by the DOS overseas.²¹³ These applicants could apply within nine months without paying a new SEVIS fee.²¹⁴

The new DHS proposal was not without controversies. The American Immigration Lawyers Association objected to the new fee regulations on a number of grounds.²¹⁵ First, the fee was set higher than permitted by enabling statutes. Section 641 of the IIRIRA of 1996 (Public Law 104-208), the Visa Waiver Permanent Program Act of 2000 (Public Law 106-396), or the USA PATRIOT Act (Public Law 107-56) only provided authority for charging fees for the collection of student/visitor information.²¹⁶ DHS was charging the visa applications 60% for cost of enforcement and monitoring of foreign students and visiting scholars. Second, the fee was set higher than necessary.²¹⁷ The initial 1999 CIPRIS (predecessor of SEVIS) fee study set the fee at \$95.²¹⁸ This included all direct and indirect program costs. In 2002, an INS sponsored KPMG fee study recommended a \$54 SEVIS fee. One year later, the DHS proposed a fee of \$100 and the hiring of 240 staff. Third, secondary (high school) students should not have to be charged a SEVIS fee. Neither the IIRIRA nor the USA PATRIOT Act required such a fee.²¹⁹ Fourth, short term students, e.g. English language students, should not be charged \$100 SEVIS fees. They would not come to the United States for a short course if the fees are high. Fifth, the SEVIS fee should be paid together with the visa application fees, at the US Embassy, not separately.²²⁰ Sixth, the fees should only be paid once per alien student per program, not when the students transferred to another program.²²¹ Seventh, CDHS should clarify when duplicate fees are required (e.g. “when an individual begins

213. *Id.* at 61150–61152.

214. *Id.* at 61151.

215. Ltr. from Am. Immig. Laws. Assn. to Dir., Regs. & Forms Servs. Div., Dept. of Homeland Sec., AILA’s *Comments on DHS Proposed Regulation on SEVIS Fees: Re: Comments to Proposed Rule “Authorizing Collection of the Fee Levied on F, J, and M Nonimmigrant Classifications Under Public Law 104-208,” ICE No. 2297-03; RIN 1653-AA23; 68 Fed. Reg. 61148, October 27, 2003* (Dec. 29, 2003) (available at <http://www.aila.org/content/default.aspx?docid=9821>).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

a new course of study or new program”).²²² Eighth, SEVIS fee collection should be as simple as possible to promote and facilitate international educational exchange.²²³

V. EXTERNAL IMPLEMENTATION DIFFICULTIES WITH SEVIS

A. Introduction

For purposes of organization and analysis, external implementation problems and operational difficulties with SEVIS can be classified into those before and after the legal deadline of January 31, 2003 (including the extensions of February 15 and August of 2003). Each deadline raised a new set of problems and concerns. For example, the concern with January 30, 2003 was whether SEVIS would be operational by August 2003, (i.e. able to handle thousands of records and millions of transactions at the same time). The second category of problems, those after February 15, 2003, included concern with getting SEVIS to work properly by making POEs notify the schools of I-20 landings. After August 2003, the concern was in fine tuning the SEVIS process in the most effective and efficient manner.

Alternatively and for analytical purposes, SEVIS implementation problems can be classified as technical, managerial and legal ones. Technical problems were those that related to SEVIS software and hardware malfunctioning, commonly reported as “glitches”, such as bleeding or lock out. Managerial problems were those that related to organizing, coordinating, accounting, monitoring of the system, such as funding and technical support. Lastly, legal problems dealt with interpretation and application of SEVIS laws, rules and regulations issues, for example, how law and regulations should be interpreted and applied in a given case or context.

B. Problems before January 31, 2003 versus Problems after January 31, 2003

In Table 6 below, the number of SEVIS implementation issues raised between June 5, 2002 and February 14, 2002, as well as after February 14, 2003 (February 15, 2003 to August 6, 2003) were close in proximity (i.e. eighty-five before that date and ninety-one after).²²⁴ However, the nature

222. *Id.* (questioning whether this included a change in major at the same sponsoring institution or a change in degree level at the same sponsoring institution or a change in category at the same sponsoring institution).

223. *Id.*

224. The data in Table 6 has been reconstructed from the following NAFSA Government

of the cases before and after February was quite different.

First, before February 14, approximately forty-three percent of the issues concerned general management policy issues.²²⁵ Twenty percent concerned applied legal issues.²²⁶ This was an outcome of a one-time NAFSA conference held in anticipation of the upcoming January 30, 2003 deadline.²²⁷ These statistics were influenced by the INS' involvement in planning activities, such as setting directions and putting out policies. Second, after February 15, 2003 most of the issues (approximately thirty-four percent) were applied legal and thirty-three

Liaison Updates (NGLUs): NAFSA: Assn. of Intl. Educators, *Summary of NAFSA's conference call with DHS and DOS regarding SEVIS*, NGLU 2003-08-a (Aug. 6, 2003) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *NGLU 2003-07-d* (July 28, 2003) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *NGLU 2003-07-c* (July 23, 2003) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *July 18, 2003 Update from DHS*, NGLU 2003-07-b (July 16, 2003) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *NGLU 2003-07-a* (June 18, June 25, July 2, & July 9, 2003) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *SEVIS Conference Calls: June 4 & June 11, 2003*, NGLU 2003-06-a (June 11, 2003) (available at <http://web.archive.org/web/20030707192109/http://nafsa.org/content/ProfessionalandEducationalResources/ImmigrationAdvisingResources/nglu200306a.pdf>) [hereinafter NGLU 2003-06-a]; NAFSA: Assn. of Intl. Educators, *SLC SEVIS Session Summary* (May 2003) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *NGLU 2003-04-c* (Apr. 30 & May 5, 2003) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *NGLU 2003-04-b* (Apr. 16 & 23, 2003) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *Summary of NAFSA Discussions with DHS, DOS, and EDS April 2, 9 and 10, 2003*, NGLU 2003-04-a (Apr. 10, 2003) (available at [http://www.nafsa.org/content/ProfessionalandEducationalResources/ImmigrationAdvisingResources/nglu200304a.pdf](http://web.archive.org/web/20040612141620/http://www.nafsa.org/content/ProfessionalandEducationalResources/ImmigrationAdvisingResources/nglu200304a.pdf)) [hereinafter NGLU 2003-04-a]; NAFSA: Assn. of Intl. Educators, *SEVIS Conference Call: NAFSA, DHS, EDS, DOS Wednesday, March 26, 2003*, NGLU 2003-03-26 (Mar. 26, 2003) (copy on file with Author) [hereinafter NGLU 2003-03-26]; NAFSA: Assn. of Intl. Educators, *NGLU 2003-03-20* (Mar. 20, 2003) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *NAFSA-INS February 14, 2003 Q and A*, <http://web.archive.org/web/20050309214529/http://www.nafsa.org/content/ProfessionalandEducationalResources/ImmigrationAdvisingResources/sevisQA20030214.htm> (Feb. 14, 2003) (INS response to a series of SEVIS questions posed by NAFSA) [hereinafter *NAFSA-INS Q and A*]; NAFSA: Assn. of Intl. Educators, *Summary of NAFSA-INS SEVIS Conference Call*, NGLU 2002-12-19 (Dec. 19, 2002) (available at <http://web.archive.org/web/20041015002933/http://www.nafsa.org/content/ProfessionalandEducationalResources/ImmigrationAdvisingResources/nglu20021219.htm>) [hereinafter NGLU 2002-12-19]; NAFSA: Assn. of Intl. Educators, *SEVIS Resource 2002-f* (Dec. 16, 2002) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *NGLU 2002-10-22* (Oct. 22, 2002) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *NGLU 2002-10-09* (Oct. 9, 2002) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *NGLU 2002-06-20* (June 20, 2002) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *NGLU 2002-06-13* (June 13, 2002) (copy on file with Author); NAFSA: Assn. of Intl. Educators, *Summary of June 5, 2002 NAFSA Conference Call with INS*, NGLU 2002-0605 (June 5, 2002) (available at <http://web.archive.org/web/20040616004126/http://www.nafsa.org/content/ProfessionalandEducationalResources/ImmigrationAdvisingResources/nglu20020605.htm>) [hereinafter NGLU 2002-0605]. Hereinafter, all citations will be collectively known as *Conference Call Summaries*.

225. *Conference Call Summaries*, *supra* n. 224.

226. *Conference Call Summaries*, *supra* n. 224

227. *Conference Call Summaries*, *supra* n. 224

percent were concrete technical issues.²²⁸ At this stage, the SEVIS system was up and running and most of the regulations were promulgated.²²⁹ The schools, with the help of DHS, were left to work through the legal ambiguities and technical glitches.

Third, while most of the issues dealt with before February 15, 2003 were general in nature. General management (37), general law (16) and general technical (9) issues made up of seventy-two percent of the cases.²³⁰ A majority of those after the implementation date (February 15, 2003) were applied ones—applied management (11), applied law (31), and applied technical (30), i.e. seventy-eight percent of the cases.²³¹

228. *Conference Call Summaries, supra* n. 224

229. *Conference Call Summaries, supra* n. 224

230. *Conference Call Summaries, supra* n. 224.

231. *Conference Call Summaries, supra* n. 224.

Table 6: Break down of SEVIS implementation—management, legal, technical—issues from June 6, 2002 to August 6, 2003²³²

Week	Issues	Man. Policy	Man. Applied	Legal Rule	Legal Applied	Tech. General	Tech. Applied	Total
6/5/02	9	5	0	4	0	0	0	18
6/27/02	14	8	0	0	0	6	0	14
6/20/02	2	2	0	0	0	0	0	2
10/9/02	19	9	0	8	0	2	0	19
10/22/02	5	4	0	0	0	1	0	5
12/16/02	5	5	0	0	0	0	0	5
12/19/02	21	2	0	2	17	0	0	21
1/30/03	USA PATRIOT Act Implementation Date							
2/15/03	INS Implementation Grace Period							
2/14/03	7	2	2	2	0	1	3	7
3/20/03	6	0	0	0	0	6	0	6
3/26/03	9	0	4	0	0	5	0	9
4/2,9 & 10/03	12	1	1	0	6	0	10	12
6/18,25/03 & 7/2,9/03	25	0	2	0	14	0	9	25
7/16/03	7	0	1	1	1	3	1	7
7/18/03	5	5	0	0	0	0	0	5
7/23/03	6	0	1	0	4	0	1	6
7/28/03	3	0	1	0	2	0	0	3
8/6/03	12	1	1	0	4	0	6	12
Total	176	44	13	17	48	24	30	176

232. *Conference Call Summaries*, *supra* n. 224. Note the following terminology—*Management Policy*: General direction of a non-legal and non-technical nature, e.g. training provided; *Management Applied*: Specific direction of a non-legal and non-technical nature bearing on a specific issue, e.g. better coordination between DHS and DOS; *Legal rule*: General discussion of certain legal rule or policy, e.g. discussion of Transitional procedures mandated by the Border Security Act; *Legal applied*: Specific analysis of conflicting interpretation of rules; *Technical general*: General discussion of technical issues, e.g. new version of SEVIS; *Technical applied*: Specific analysis of technical problems, e.g. data bleeding.

C. Problems at Planning versus Launch versus Operational Stage

Next, the study investigated the types of problems and issues that confronted the schools in the preliminary/planning stage (Table 7) compared with the before operational launch stage (Table 8) compared with the full operational stage (Table 9).

1. Planning Problems and Issues

In the preliminary/planning stage and with a fast-approaching January 30, 2003 deadline, the schools were trying to seek clarification from INS about the implementation process.²³³ There were concerns with (1) lack of final implementation regulations, (2) inadequate and unclear implementation regulations, (3) certification requirements and enrollment process, (4) lack of training for INS officers, and (5) lack of contingency planning.²³⁴ In essence, SEVIS schools were laboring under great uncertainty and suffered from grave anxiety as a result of INS's lack of a well conceived plan to implement SEVIS.²³⁵

233. The INS did have a plan for step-by-step SEVIS implementation, but the plan was abruptly cut short by 9/11. See *Student and Exchange Visitor Program Development Plan—Past, Present and Future*, U.S. Immig. & Naturalization Serv. Rpt. 23–25 (Feb. 26. 2002) (copy on file with Author) (stating that deployment started with small colleges in Boston in 2001 before reaching out to other major foreign student educational institutions nation wide, including big cities of Chicago, Denver, and Dallas).

234. *Id.*

235. *Id.*

Table 7: SEVIS Implementations problems at the preliminary/planning stage—six months before launch (June 2002).²³⁶

Date	Technical	Legal	Managerial	Summary
June 2002	NAFSA inquired about contingency planning for SEVIS failure. ²³⁷	INS informed NAFSA on status of SEVIS regulations. ²³⁸	NAFSA requested permission to pose electronic forms on the web. ²³⁹	The schools were seeking clarifications (inquiry) on procedure matters, technical, legal, and managerial.
	None	NAFSA informed INS of the inadequacy with I-20 rules. ²⁴⁰	NAFSA provided feedback on the kind of training to be provided to INS officers. ²⁴¹	The attention of the schools were focused on providing feedback (consultation) on procedure matters; technical, legal and managerial.
	INS provided general information on discovery procedure. ²⁴²	N/A	INS clarified enrollment ²⁴³ and registration plan. ²⁴⁴	The exchanges between schools and DHS were concerned with general rules, not applied rule or specific case information.
	INS provided basic information on data loss in batch transfer. ²⁴⁵	INS informed NAFSA on the need for and timing of compliance review of J and M schools. ²⁴⁶	INS reported it was currently gathering information on how to collect SEVIS fees. ²⁴⁷	Inquiry and feedback concerns mostly preliminary, fundamental, basic, threshold and tentative matters. ²⁴⁸

236. All references in Table 7 come from NGLU 2002-0605, *supra* n. 224.

237. *Id.* at “Issue: SEVIS Back-Up Systems” (NAFSA request for information on contingency planning—backed up, redundancy—in case SEVIS fails. For example, existence of “mirror site” and losing “batch” data transmitted.)

238. *Id.* at “Issue: Transitional Procedures Mandated by the Border Security Act” (stating that “Section 501(c)(1)(B) of the Border Security Act requires the Department of State (DOS) to transmit to INS notification that an F or M visa has been issued. INS said that they are working with DOS on this data sharing requirement”).

239. *Id.* at “Issue: Sample SEVIS Screens and Forms” (“NAFSA requested electronic copies of SEVIS screens and forms to post on the NAFSA Web site.”).

240. *Id.* at “Issue: I-20’s for F-2 Dependents” (I-20 issuance regulations do not make reference to dependents.)

241. *Id.* at “Issue: SEVIS Training for INS Officials” (“What is the scope, nature, and intent of INS’ plans to train its field officers in SEVIS systems, procedures, and forms? . . . NAFSA emphasized the importance of giving training and clear field guidance to both POE and Service Center personnel.”).

242. *Id.* at “Issue: SEVIS Back-Up Systems” (“If the primary system in the DC area goes down, INS will switch to a disaster recovery site that mirrors that primary system.”).

243. *Id.* at “Issue: I-17s, SEVIS, and Recertification Issues” (INS informed NAFSA on stages of enrollment in SEVIS and where to look for “regular” and “preliminary” enrollment rules and regulations.)

244. *Id.* at “Issue: SEVIS Back-Up Systems” (“If a school using the “batch” option lost data kept on-campus in a batch solution software, INS would be open to downloading (data dumping) files to the schools.”).

245. *Id.*

246. *Id.* at “Issue: I-17s, SEVIS, and Recertification Issues” (Border Security Act § 502 (BSA)

2. Launch Problems and Issues

In the middle stage, the schools were directly confronted with SEVIS. The schools legally dealt with ill-defined regulations and operational difficulties dealing with untested INS software.²⁴⁹ The questions raised were more pointed and practical than theoretical and overarching.²⁵⁰ For example, the schools were concerned with how to communicate with the SEVIS system users in situations when the system is inaccessible.

Table 8: SEVIS Implementation problems before operational launch date (December 19, 2002 and February 14, 2003).

Date	Technical	Legal	Managerial	Summary
Feb. 14 2003 ²⁵¹ Dec. 19, 2002 ²⁵²	INS: "request users register for batch from the server they intend to use to post and get files from batch so their server will have both the SEVIS site certificate in their certificate store and their '.pem' client certificate in a location where their automated application can use their certificate to establish an SSL connection." ²⁵³	DHS provided step by step: "Guidance from INS on STUDENT ENTRIES AT INS POE - SEVIS I-20 PROCESSING" ²⁵⁴	"Q: SEVIS system inaccessibility. How does the Service plan to communicate information to system users when the system is inaccessible?" ²⁵⁵ "However, in the case . . . the system is inaccessible or abnormally slow for a period that may impact the business process of schools, the Service is developing a contingency plan to allow schools to carry out their normal processes despite system problems . . . [T]he Service would contact each school in such circumstances and advise them of any temporary processes. This contact would most likely be via e-mail." ²⁵⁶	At this stage, the problems and issues raised were mainly practical in nature and operational in kind.

requires INS to conduct regular compliance review of F and M schools every two years, beginning no later than May 2004, two years after promulgation of BSA).

247. *Id.* at "Issue: SEVIS Fee." (INS was studying ways of making SEVIS payment and to clearly define the role of the DOS in the process.).

248. *Id.*

249. *See infra* nn. 251–261 and accompanying text..

250. *Id.*

251. *NAFSA-INS Q and A, supra* n. 224. INS responded to a series of SEVIS questions posed by NAFSA. Issues addressed included: effective date of restrictions on duration of reduced course load authorizations, SEVIS training for INS personnel, SEVIS system inaccessibility; processing of SEVIS I-20s at ports of entry, vendor certification, and customer agreements for use of Batch functionality. *Id.*

252. NGLU 2002-12-19, *supra* n. 224.

253. *NAFSA-INS Q and A, supra* n. 224, at "Q: Questions about Language in the Customer Agreement for Using the SEVIS Batch-File Transfer Process."

254. *Id.* at "Q: SEVIS Related Guidance/Training for INS personnel."

255. *Id.* at "Q: SEVIS System Inaccessibility."

256. *Id.*

Date	Technical	Legal	Managerial	Summary
			<p>“[S]ervice personnel . . . are unfamiliar with SEVIS documents and procedures. What steps is the Service taking to educate its personnel about SEVIS?” (2/14/03)²⁵⁷</p> <p>vs.</p> <p>“What is the scope, nature, and intent of INS’ plans to train its field officers in SEVIS systems, procedures, and forms?” (6/5/2002)²⁵⁸</p>	<p>The questions asked were more confrontational and demanding.</p>
			<p>“The Service has already carried out a number of extensive training sessions . . . As with any new program . . . it will take some time for every individual involved to be fully trained . . . Service is working with schools that make inadvertent mistakes in the system, we will work with schools that are experiencing problems due to unfamiliarity on the part of Service entities . . .” (2/14/03)²⁵⁹</p> <p>vs.</p> <p>“INS assured NAFSA that service center personnel are and will continue to receive training and guidance.” (6/5/2002)²⁶⁰</p>	<p>The answers given are more defensive.</p>
			<p>“How does the Service plan to communicate information to system users when the system is inaccessible?”²⁶¹</p>	<p>The three kinds of questions most often asked are: access, corrections, and communication/ help.</p>

3. Operational Problems and Issues

Finally, when SEVIS was fully operational, the schools and programs confronted case-specific operational issues or application problems. These problems ranged from ambiguous SEVIS regulations to unresolved legal issues to a mismatch between SEVIS regulations and SEVIS technology. The defining characteristics of the issues and problems posed during this period were increasingly concrete and sophisticated.

257. *Id.* at “SEVIS Related Guidance/Training for INS Personnel.”

258. NGLU 2002-0605, *supra* n. 224, at “Issue: SEVIS Training for INS Officials.”

259. NAFSA-INS Q and A, *supra* n. 224, at “SEVIS Related Guidance/Training for INS Personnel.”

260. NGLU 2002-0605, *supra* n. 224, at “Issue: SEVIS Training for INS Officials.”

261. NAFSA-INS Q and A, *supra* n. 224, at “Q: SEVIS System Inaccessibility.”

Table 9: SEVIS Implementation problems at the full-operational stage, during six months after launch to January 2004

Date	Technical	Legal	Managerial	Summary
Jan. 2004 ²⁶²	The SEVIS program did not have extension of stay for more than 12 months. DHS did not promise to change it, but instead was "open to discussion" if the year limit was insufficient. ²⁶³	J-1 was departing from the country, leaving his/her J-2 dependent behind with his spouse who was how to complete this information in SEVIS. ²⁶⁴ The DOS did not know the answer and needed to determine the answer. ²⁶⁵	Some students did not have POE data, and DHS requested for "school and program officials [to] fax examples of those who have entered the US and for whom there is no POE data." ²⁶⁶	At the full – operational stage the problems and issues were all operational ones and driven by particular and specific case based concerns.
	Schools had been trying to enter OPT data beyond the day the program is scheduled to end, but were prevented from doing so by the software. ²⁶⁷ The problem arose because of an incorrect interpretation, which listed the program end date as "date student's program will be	Question raised was whether an OPT student was considered to be engaging in another level of education if they took courses "incidental to their OPT employment." ²⁶⁹	DSO reportedly made a mistake of authorizing OPT for student 1 in the name of student 2, who has a identical name and a SEVIS ID number that had a one digit difference in the middle of the number. The Texas Service center a SEVIS ID number that had a one digit difference in the middle of the number. Meanwhile student 2 wanted to apply for OPT but could not receive a recommendation because the mistake left	Inquiries and concerns are directed at solving/ correcting specific problems on hands.

262. NAFSA: Assn. of Intl. Educators, *SEVIS Conference Call Summary: January 10 and 17, 2004 Calls*, NGLU 2004-01-a (Jan. 17, 2004) (copy on file with Author) [hereinafter NGLU 2004-01-a].

263. NAFSA: Assn. of Intl. Educators, *SEVIS Conference Call: Wednesday, November 19, 2003*, NGLU 2003-11-b, "3. When Will F SEVIS Allow Extensions of Stay Over 12 Months?" (copy on file with Author) [hereinafter NGLU 2003-11-b].

264. NAFSA: Assn. of Intl. Educators, *SEVIS Conference Call: NAFSA, DHS, DOS Wednesday, September 10, 2003*, NGLU 2003-09-b, "4. How should an A/OR switch the dependents of J-1 parents?" (copy on file with Author) [hereinafter NGLU 2003-09-b].

265. *Id.*

266. NGLU 2004-01-a, *supra* n. 262, at "3. Records of Students and Exchange Visitors without POE Data."

267. NAFSA: Assn. of Intl. Educators, *SEVIS Conference Call: NAFSA, DHS, DOS, Friday, September 5, 2003*, NGLU 2003-09-a, "5. Banner Software and Recommending OPT," (September 5, 2003) (copy on file with Author) [hereinafter NGLU 2003-09-a].

Date	Technical	Legal	Managerial	Summary
	completed. Full program includes Optional Practical Training the student will undertake after coursework.' (sic) ²⁶⁸		an OPT ¹ recommendation in his file already. ²⁷⁰	
	SEVIS 4.9.2, release planned for Feb. 6, 2004 "will allow batch users to submit 'create' requests for F, M or J's who will be beginning new programs and who have had a SEVIS record in the same visa classification in the past." ²⁷¹	Legal counsel at DHS – CIS advised that OPT I-765 must be received on or before Program End Date. ²⁷²	The SEVIS required students who take up to 18 hrs. a week of school work to apply for a student visa, subject to SEVIS fees and lengthy interviews. ²⁷³ Consulates have been giving B-1 visa when students asked for F-1 to study for short intensive courses. DHS said that F-1 (student status) was the proper way to go if that was the category they belonged to. DHS and DOS did not finish this conversation during this call. ²⁷⁴	The discussion of and solution to problems and issues at this stage were engaged at a legal-technical level, with correct answers.

VI. VARIETIES OF IMPLEMENTATION PROBLEMS: SUMMARY AND DISCUSSION

A. Varieties of Managerial Problems

Most of the difficulties throughout the SEVIS implementation

268. *Id.*

269. *Id.* at "2. OPT and Incidental Study."

270. NAFSA: Assn. of Intl. Educators, *SEVIS Conference Call: NAFSA, DHS (SEVIS, Service Center and Adjudications) BCIS, BICE, EDS, CA, CIEE, Wednesday, October 1, 2003*, NGLU 2003-10-a, "7. OPT Errors" (Oct. 1, 2003) (available at <http://web.archive.org/web/20031212021850/www.nafsa.org/content/ProfessionalandEducationalResources/ImmigrationAdvisingResources/nglu200310a.pdf>) [hereinafter NGLU 2003-10-a].

271. NGLU 2004-01-a, *supra* n. 262, at "4. SEVIS 4.9.2 Implementation."

272. *Id.* at "5. CIS Says OPT I-765 Must be Received on or Before Program End Date."

273. NAFSA: Assn. of Intl. Educators, *SEVIS Conference Call: NAFSA, DHS, EDS, DOS, Wednesday, October 8, 2003*, NGLU 2003-10-b, "7. Short Academic Programs" (Oct. 2003) (available at <http://web.archive.org/web/20040407143433/http://www.nafsa.org/content/ProfessionalandEducationalResources/ImmigrationAdvisingResources/nglu200310b.pdf>) [hereinafter NGLU 2003-10-b].

274. *Id.*

process resulted from poor project planning and management. The successful implementation of SEVIS requires good management, adequate resources, sound technology and clear legal guidelines. However, it seems none of these issues have been attended to.

1. Problems with Planning

The implementation of SEVIS suffered from a lack of overall detail and long-term planning. The objectives, role and responsibilities, steps, activities, timelines and deadlines were not well thought-out and articulated in advance. Many universities were unaware of what changes they would have to make in order to accommodate SEVIS.²⁷⁵ This approach resulted in schools having to adopt a “wait and see” or “play it by ear” approach to program management.²⁷⁶ This generated substantial amounts of uncertainty, frustration, anxiety, animosity, complaints, and antagonism. For example, Stanford’s Bechtel International Center noted:

As of April 2002 much is still unclear. The Immigration Service is currently developing regulations that will clarify the system to both monitor and collect data on foreign students and scholars. We have no clear date as to when these regulations will be published.²⁷⁷

As a result, some universities were not able to comply with SEVIS in time, such as the University of Nevada, Las Vegas (UNLV).²⁷⁸ UNLV planned to comply with SEVIS, but because they did not have the computer specifications they missed the deadline set to implement the program.²⁷⁹

Others expressed similar concerns about the deadlines and timetables that INS was putting in place:

First, we should jointly establish a timetable for the implementation of SEVIS with interim deadlines for specific activities. It is, for example, important for campuses to know the precise date by which EDS will have written all the programming for [real-time] and batch entry, and the date by which a test file will be available on a web site to permit schools to practice with the system. Having such a timetable will provide a framework for implementation, allow all parties to measure

275. Gaston Iacombe, *SEVIS Implementation*, European Advisers Newsletter 3 (Summer 2002), http://www.bibl.u-szeged.hu/oseas/newsletter/02summer_lacombe.html.

276. *Id.*

277. Bechtel Intl. Ctr. at Stanford U., *SEVIS, Tracking Systems and other Recent Legislation and Regulations*, http://www.stanford.edu/dept/icenter/new/sevis/sevis_1.html (April 2002).

278. Jennifer Knight, *Nevada Sees Deadline Pass for Student Database*, Las Vegas Sun (Feb. 27, 2003), <http://www.lasvegassun.com/sunbin/stories/text/2003/feb/27/514723089.html> (detailing how UNLV failed to meet SEVIS compliance because INS has failed to organize the implementation of SEVIS in a comprehensive and systematic manner).

279. *Id.*

progress against a clear benchmark, and enable campus officials to better plan the changes that will be necessary at their institution. If delays occur, resources can be shifted and the schedule can be adjusted appropriately by both federal and campus officials.²⁸⁰

2. *Problems with Training*

INS/DHS has not offered formal SEVIS implementation training for its own agency employees, as shown below, and SEVIS training and certification was not required of DSO and other school officials who were the front line operatives responsible for complying, operating and maintaining SEVIS. For example, it was unclear to school officials what was required by SEVIS.²⁸¹ School officials learned through trial and error and through sharing SEVIS experiences with others.

Originally, INS intended to offer face-to-face training to schools officials.²⁸² Later, all scheduled training sessions for the use of the SEVIS data-base were cancelled due to the elimination of the INS implementation team.²⁸³ INS offered to send training videos, to organize informational seminars at higher educational conferences, and to give access to 800 Help Desk assistants to assist with the implementation and use of SEVIS.²⁸⁴ In retrospect, this approach to launching SEVIS accounted for many of the problems confronted by DHS and schools in the SEVIS implementation and operation stages.

University officials have relied on school associations, in-house

280. Ltr. from David Ward, Pres., American Council on Education, to James W. Ziglar, Commr., Immig. and Naturalization Serv., U.S. Dept. of Just., (Jan. 24, 2002) (available at http://www.nasulgc.org/Washington_Watch/Letters2002/Ziglar_0124.pdf); H.R. Subcomm. on Immig., Border Sec. & Claims of the Jud. Comm., *Nonimmigrant Student Tracking: Implementation and Proposed Modifications*, 108th Cong. 58 (Apr. 2, 2003) (available at http://commdocs.house.gov/committees/judiciary/hju86265.000/hju86265_of.htm) (testimony of David Ward that “the INS has not provided adequate training to anyone”) (emphasis in the original); see also H.R. Subcomms. on 21st Cent. Competitiveness & Select Educ. of the Comm. on Educ. & the Workforce, *Homeland Security: Tracking International Students in Higher Education - Progress & Issues Since 9-11*, 107th Cong. 61 (Sept. 24, 2002) (available at <http://edworkforce.house.gov/hearings/107th/21st/studvisa92402/fine.htm>) (statement of Glenn A. Fine, making recommendations about how to improve the effectiveness of SEVIS and the uncertainty in the field in regards to standards to certify schools).

281. See *Nonimmigrant Student Tracking: Implementation and Proposed Modifications*, 108th Cong. at 58 (claiming INS has given inadequate training).

282. See e.g. U.S. Dept. of Just., *Immigration and Naturalization Service Student & Exchange Visitor Information System Seminar*, <http://nafsa3.okstate.edu/oknafsa/Docs/sevis-training.doc> (June 7, 2002). The seminar prepared DSO, RO, ARO for the summer release of SEVIS. It addressed issues of “system functionality, program history, and user access.” *Id.* There was no “technical discussion or presentation on the batch file transfer functionality.” *Id.*

283. *Id.*

284. *Id.*

trainers or third party vendors²⁸⁵ to provide for the missing SEVIS training. As a result, many school employees were inexperienced and uneducated about INS and SEVIS requirements.²⁸⁶ This was particularly a problem with small schools or vocational institutions with few resources and few connections. Likewise, INS officials were untrained to approve and monitor schools, and the Help Desk staff was not properly briefed. As a result, the staff was uncertain as to the exact legal requirements and detailed operation procedures.²⁸⁷

3. *Problems with Coordination*

The success of SEVIS required the cooperation and coordination of different government agencies, such as DOS, DHS–Custom, DHS–Immigration, DEA, and the Help Desk, as well as participating schools. The agencies were often in disagreement as to policy, rule interpretation, technical sophistication, and SEVIS integration. Schools were frustrated when government agencies in charge of key SEVIS processes were not performing as expected and were sometimes not in accordance with the law. For example, in order for schools to monitor the arrival time of F-1 and J-1 students, the schools must be informed by the POEs of their arrival in the United States. In September 17, 2003, schools reported that relatively few EV and students appeared on the POE list.²⁸⁸ The DHS explained that the problem was due in part to different POE codes adopted by INS and customs agencies.²⁸⁹ In order to not reject all files, the mismatch of codes forced the transfer of data to an “unknown” category.²⁹⁰

285. See e.g. Amy Rogers, *EDS Among Solution Providers Seizing Opportunity in Foreign-Student Tracking*, ¶ 5, <http://certivo.net/document/crnedcs.pdf> (Jan. 14, 2003) (EDS and Drake Certivo developed the SEVIS interactive training course based on comments gathered from 2000 school officials); see also e.g. FDS, *Homeland Security Goes to School*, <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/02-03-2003/0001883761> (Feb. 03, 2003) (describing course for SEVIS training).

286. See *Nonimmigrant Student Tracking: Implementation and Proposed Modifications*, 108th Cong. at 58 (claiming INS has given inadequate training).

287. *Homeland Security: Tracking International Students in Higher Education - Progress & Issues Since 9-11*, 107th Cong. at 61.

288. NAFSA: Assn. of Intl. Educators, *SEVIS Conference Call with DHS & DOS, Wednesday, September 17, 2003*, NGLU 2003-09-c, “4. POE Entry Records in SEVIS,” (Sep. 17, 2003) (copy on file with Author) [hereinafter *NGLU 2003-09-c*].

289. *Id.*

290. *Id.*

Table 10: Implementation difficulties confronted by users as a result of poor SEVIS project management.²⁹¹

Management functions	Implementation problems	Manifestations of problems at the operational level
Planning	<p>There was no or inadequate planning for the effective implementation of SEVIS. Procedurally, university administrators and educator associations were not involved with the formulation of the implementation plan. Substantively, the INS SEVIS implementation plan failed to take into account the shortage of time, limitations of resources, volume of work, complexity of tasks, degree of difficulties, multiplicity of parties and uniqueness of universities.</p>	<p>Schools were not consulted on implementation deadlines. INS and SEVIS imposed deadlines at odds with the university calendar. INS and SEVIS imposed mandates, requirements and processes at odds with university philosophies, missions, cultures and routines. INS provided competing opinions and wrong information, e.g. regulations and guidelines, and missed critical path deadlines for meeting compliance. INS did not provide for the timely and adequate training of change agents, INS agents and school officials alike. Many school applications were still not processed days before January 30, 2003. SEVIS program was not fully debugged before launched. SEVIS lacked capacity to handle sudden surge of workloads. SEVIS software program and attending INS guidelines and procedures did not reflect university operational realities, interests or needs.</p>
Organizing	<p>There was a gross lack of integration and coordination of functions and efforts between and within DHS and DOS charged with implementing SEVIS. Particularly: DHS and DOS did not share in the same organizational mission, structure process or culture. DHS and EDS have yet to develop a smooth working relationship. DHS has not fully integrated INS and Customs into a coherent organizational framework, creating unresolved jurisdiction, identity, role and functions problems.</p>	<p>DOS did not have access to SEVIS data real-time. There were problems of lost and delayed data transmission. DHS and DOS interpreted SEVIS differently. In some cases, DOS worked at odds with DHS. There was a lack of coordination between EDS (private contractor) and DHS.</p>
Staffing	<p>There was inadequate staff placement, insufficient staff training, and poor staff support to meet SEVIS implementation needs.</p>	<p>DHS did not have sufficient staff to service SEVIS. There was not enough staff to provide for research. There was not enough staff to man Help Desk. There was not enough training for DHS SEVIS officials and inspector.</p>
Directing	<p>There was a gross lack of leadership, motivation, communication in achieving SEVIS goals and objectives.</p>	<p>The INS was not forthcoming on the readiness and availability of SEVIS. This affected the confidence of schools in DHS judgment. The DHS has failed to work with schools as equal partners, failed to inform the schools of problems and issues afflicting</p>

291. *Id.*

Management functions	Implementation problems	Manifestations of problems at the operational level
		SEVIS, failed to consider SEVIS' impact on schools, and has failed to listen to schools. The DHS has not been solicitous of schools welfare by anticipating their needs and protective of their welfare.
Controlling	There was a total lack of process and outcome evaluative measures pointing to success.	INS/DHS define successful implementation, differently than universities and schools. Except for limited SEVIS functions, e.g. Help Desk response time, there was no attempt to measure the performance of SEVIS as a system or process. No one knew whether the SEVIS was functioning as designed. DHS testified that it was successful. Schools complained of shortcomings and students were not coming to the United States to study.

B. Types of Legal Problems

1. Problems with Clear Legislative Mandate

Successful implementation of SEVIS required a clear understanding of the roles and responsibilities of all parties involved. From the very beginning, there was a debate as to who was legally responsible for the development, funding, and deployment of SEVIS.

According to Section 641(a) of the IIRIRA of 1996 the Attorney General is legally responsible to “develop and conduct a program to collect from approved institutions of higher education, other approved educational institutions, and designated exchange visitor programs in the United States” certain specified information.²⁹² Furthermore, “the Attorney General . . . shall establish an electronic means to monitor and verify “certain enumerated events pertaining to foreign individuals that require visas.”²⁹³

The central issue when dividing SEVIS responsibilities between the government (as provider) and universities (as end users) during the implementation phase of the SEVIS project was how to adequately “develop and conduct a program to collect from approved institutions of higher education, other approved educational institutions, and designated exchange visitor programs” necessary data and adequate information for efficient and effective electronic tracking of students and scholars.²⁹⁴ More specifically, who is responsible for implementing the

292. 8 U.S.C. § 1372(a)(1) (2000).

293. *Id.* at § 1372(a)(3).

294. *Id.* at § 1372(a)(1).

SEVIS program, and when is the SEVIS program deemed fully implemented? Does this mean that the government, specifically INS/DHS, is only required to make SEVIS “technically available” via interactive mode to some users by January 30, 2003? Or does it mean that the INS/DHS is also responsible for making SEVIS “functionally available” via batch transmission to all users?

The government argued for a restrictive definition of “full implementation.”²⁹⁵ SEVIS is “fully implemented” when it is *technically available* for service, such as an INS-SEVIS web site that is ready for interactive input and output on a case by case basis.²⁹⁶ Whereas, the schools argued for a broad definition of “full implementation:”

Full implementation of the monitoring program necessarily includes the process by which schools develop or acquire the technology necessary to accomplish the reporting required under the program in accordance with technical specifications provided by the Service. It is inherently impossible for schools to meet the program’s reporting requirements without this stage of the implementation of the process having taken place.²⁹⁷

More fundamentally, “full implementation” should include fully beta tested SEVIS technology as operated and supported by well trained DSOs and competent and supportive INS officials.

The DOJ-IGO adopted a still broader definition of “full implementation.”

Full deployment requires that all elements of the program be functional to ensure the integrity of SEVIS. Our finding that SEVIS was not fully implemented as of January 1, 2003, was not based *solely* on the INS’s deployment of a phased-in schedule. Instead, as stated in our testimony in September 2002 and in this report, we believe full implementation includes not only the technical availability of SEVIS, but also ensuring that sufficient resources are devoted to the foreign student program, ensuring that only bona fide schools are provided access to SEVIS, adequately training DHS employees and school representatives, ensuring that schools are completely and accurately entering information on their foreign students into SEVIS in a timely manner, and establishing procedures for using SEVIS data to identify noncompliant and fraudulent operations as well as following up when SEVIS data indicates fraud in a school’s program.²⁹⁸

Based on the above criteria, DOJ-OIG found that the SEVIS

295. *Follow-up Review, supra* n. 14, at app. III.

296. *Id.*

297. *Id.*

298. *Id.* (emphasis in original).

implementation was not complete. Specifically, the INS did not complete certification reviews of all school applications at the time originally promised.²⁹⁹ Also, the INS did not sufficiently monitor the internal controls of schools that would detect and prevent fraud.³⁰⁰ Further, INS adjudicators and INS port of entry inspectors had not been given adequate training and guidance,³⁰¹ and the INS had not provided sufficient resources for investigating potential fraud.³⁰²

299. *Id.* See also H.R. Subcomm. on Immig., Border Sec., & Claims of the Jud. Comm., *Implementation of the Student and Exchange Visitor Information System (SEVIS)*, 107th Cong. 16, 19 (Apr. 2, 2003) (available at <http://judiciary.house.gov/media/pdfs/printers/108th/86265.PDF>) (statement of Glenn A. Fine detailing problems with school certifications and procedures).

300. *Follow-up Review*, *supra* n. 14, at 22.

301. *Id.* at 23–25.

302. *Id.*

Table 11: Interpretations of "full implementation" of SEVIS³⁰³

School/Agency	Interpretation	Ready by January 30, 2003?
Universities	(1) SEVIS system meeting legislative requirements?	No tracking for J - 1 visitors
		No tracking for J - 1 dependents (J-2)
	(2) SEVIS system technically available?	Too slow
		Too many flaws
	(3) Batch system technically available?	Final regulations for F visa not timely issued
		Final regulations for J visa not issued
		Technical specifications not timely released to vendor
		No beta testing for batch system
	(4) SEVIS system functionally available?	Lack of timely school certifications
		Lack of training for DSOs
		Lack of training for INS officials
Lack of coordination with DOS		
Lack of timely and competent help-support		
SEVIS full implementation? (1) + (2) + (3) + (4)	Unfunded mandates	
SEVIS full implementation? (1) + (2) + (3) + (4)	No	
DOJ - IGO ³⁰⁴	(1) SEVIS system meeting legislative requirements?	No comment.
	(2) SEVIS system technically available?	No comment.
	(3) Batch system technically available?	No comment
	(4) SEVIS system functionally available?	Schools not approved for timely access
		Compliance audits not properly performed
		Need additional training and guidance for adjudicators and inspectors
		Need sufficient resources needed for enforcement procedures
SEVIS full implementation?	No.	
INS - DHS	(1) SEVIS system meeting legislative requirements?	Yes. SEVIS Technically available as of January 30, 2003.
	(2) SEVIS system technically available?	Yes.
	(3) Batch system technically available?	Yes.
	(4) SEVIS system functionally available?	Yes.
	SEVIS full implementation?	Yes.

303. *Follow-up Review, supra* n. 14, at app. III.304. *Id.*

2. *Problems with Lack of Timely Regulations*

The implementation of SEVIS suffered from a lack of timely, comprehensive and clear regulations. In the last six months prior to the launch date, May 2002 to January 2003, there had been no less than five sets of regulations to implement SEVIS.³⁰⁵ It is clear that these administrative regulations were promulgated to meet the SEVIS deadline of January 30, 2003. Very little thought was expended on whether such rules could or would be complied with given the shortage of time, complexity of rules, and difficulties of compliance.

As early as January 28, 2002, AARAO raised an alarm: Since no formal regulations regarding implementation of SEVIS have been issued by the INS, many higher education advocates are concerned that colleges and universities will have inadequate time to test and implement the SEVIS system on their campus and comply with the January 2003 implementation date.³⁰⁶

By March 20, 2002, the INS and DOS were openly discussing the possibility of issuing more SEVIS-related implementations and regulations. These included (1) regulations for a shorter default period for visitor's visa, including students,³⁰⁷ (2) regulations preventing students from taking classes before visa approval,³⁰⁸ (3) regulations governing recertification of schools authorized to issue I-20 forms,³⁰⁹ (4) regulations governing implementation of SEVIS for F and M visas,³¹⁰ (5) regulations governing implementation of SEVIS for J visa,³¹¹ and (6) regulations governing the collection of SEVIS fees.³¹²

Such regulations, however, were not forthcoming until the final compliance date of January 30, 2003. Throughout the implementation period, from October 26, 2001 to January 2003, the INS and the DHS had failed to provide the schools, administrators, students, visitors and vendors with necessary and timely regulations and guidelines to put

305. See 67 Fed. Reg. at 34862 (proposed rule implementing SEVIS); 67 Fed. Reg. at 44344 (interim rule for schools to apply for preliminary enrollment in SEVIS); 67 Fed. Reg. at 60107 (interim rule for certification of schools applying for enrollment in SEVIS); 67 Fed. Reg. at 76256 (DHS's final rule implementing SEVIS); 67 Fed. Reg. at 76307 (DOS interim rule implementing SEVIS).

306. Shelley Rodgers, *Colleges, Universities Consider SEVIS Implementation*, http://www.aacrao.org/transcript/index.cfm?fuseaction=show_print&doc_id=610 (Jan. 28, 2002).

307. Shelley Rodgers, *Possibly Six SEVIS Regulations Outstanding*, http://www.aacrao.org/transcript/index.cfm?fuseaction=show_print&doc_id=684 (Mar. 20, 2002).

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

SEVIS into place before January 30, 2003.

The USA PATRIOT Act set a January 30, 2001, deadline for compliance. On May 16, 2002, the Service published a proposed rule³¹³ to implement the foreign student data electronic collection, reporting, and tracking process as mandated under Section 641 of the IIRIRA of 1996. On June 13, 2002, the INS released the final Interface Control Document to third-party vendors to facilitate SEVIS software development.³¹⁴ On July 1, 2002, INS invited voluntary participation in SEVIS. The final regulations, entitled “Retention and Reporting of Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS)” was finally published on December 11, 2002.³¹⁵

By September 24, 2002, approximately 125 days before the final compliance day, a number of key regulations were yet to be finalized and published.³¹⁶ These included SEVIS regulations governing international student visas (F and M) to be issued by DHS,³¹⁷ exchange visitor visas (J) to be issued by the State Department,³¹⁸ and recertification of schools authorized to issue I-20s.³¹⁹

3. *Problems with Inadequate Regulations*

Not only was there a lack of implementation regulations to put SEVIS into practice, the regulations that were promulgated were often incomplete and imprecise. This caused much anxiety when the deadline for SEVIS approached. For example, no one at the schools or the DHS knew how to deal with the following scenario: Both parents of a J-2 dependent have J-1 status, and one of those parents was graduating from school.³²⁰ The question was whether the J-2 dependent record should be amended to shift the dependency status to the non-graduating J-1 parent and reference the ID in the remarks, whether the J-2 student “graduated”

313. 67 Fed. Reg. at 34862.

314. PeopleSoft, *supra* n. 48.

315. 67 Fed. Reg. at 76256.

316. H.R. Subcomms. on 21st Cent. Competitiveness & Select Educ. of the Comm. on Educ. & the Workforce, *Homeland Security: Tracking International Students in Higher Education – Progress & Issues Since 9-11*, 107th Cong. 107 (Sept. 24, 2002) (available at <http://edworkforce.house.gov/hearings/107th/21st/studvisa92402/ward.htm>) (testimony of Dr. David Ward).

317. *Id.* (“They must still be reviewed and cleared by both the Justice Department and the Office of Management and Budget (OMB).”).

318. *Id.* (“The draft regulations have been under review at OMB for more than 100 days. . . . Again, without regulations, we do not know what is expected of us.”).

319. *Id.*

320. NGLU 2003-11-b, *supra* n. 263, at “1. J-2 and F-2 Dependents Moving from One Parent Record to Other.”

with the graduating J-1, or whether a new and independent J-2 file should be created for the child.³²¹ The DHS representative asserted that they should change the record according to the first option listed above.³²²

Similarly, the INS was not ready to deal with OPT issues without a clear guideline. Schools were complaining about the “[a]bsence of post-completion OPT language in the proposed F regulation.”³²³ NAFSA pointed out that there was an ambiguity in the regulations because paragraphs three and four of 8 CFR 214.2(f)(10)(2)(A), dealing with “optional practical training (OPT) after completion of studies,” was absent from the INS proposed rule, but post-completion OPT was alluded to in other INS literature.³²⁴ INS agreed to look into the problem.³²⁵

In the proposed regulations for implementing SEVIS, information regarding issuing I-20’s for F-2 dependents was absent, although it was contained in the supplementing language to the proposed rule.³²⁶ INS promised to investigate.³²⁷

4. *Problems with Conflicting Regulations*

There were often conflicts between the INS rule and the DOS rule. For example, in December 2003, language in the supplementary text of the J SEVIS rule, indicated that J-2s must change status in order to pursue a course of study “other than vocational or recreational.” However, there was no corresponding language in the Federal Regulatory Rule text. The F SEVIS rule, at 248.3(e)(2) suggested that dependents of a J-1 may attend school, provided the principal maintains status.³²⁸

DOS confirmed that full-time students were not permitted in J-2

321. *Id.*

322. *Id.*

323. NGLU 2002-0605, *supra* n. 224, at “Issue: Absence of Post-Completion OPT Language from in the Proposed Regulation.”

324. *Id.*

325. *Id.*

326. *Id.* at “Issue: I-20’s for F-2 dependents.”

327. *Id.*

328. See Memo. from Jim Ellis, Dir, Auburn U. & Derek Yu, Asst. Dir., Auburn U., to all international students and scholars enrolled at Auburn U., *INS and Department of State F, M, and J SEVIS Rule Changes, 10. Dependents* (Dec. 16, 2002) (available at http://www.auburn.edu/academic/other/international_education/office/advisories/newregs121602.htm) (“At this time there is conflicting information in the regulations on whether J-2 dependents may study full time—to be safe assume that J-2’s are NOT allowed to pursue full time study.”).

status, except for J-2 dependents enrolling in K-12 programs.³²⁹ However, the intention of this rule was expressed only in the preamble to the J regulations and not in the language of the SEVIS rule itself.³³⁰ In order to legally prohibit J-2 dependents from studying, the SEVIS regulations would have to be changed. DOS stated that they intended to change the language in their final SEVIS regulations.³³¹ Such a correction would also have to be coordinated, however, with a corresponding change to INS regulations, which on their face permitted full-time study by J-2 dependents.³³² Until these corrections to the regulations are made, there is no restriction on study for J-2 dependents.

5. *Problems with Unclear Regulations*

Many of the regulations were ambiguous and unclear. A case on point involved the reporting of timely participation of exchange visitors in designated programs. As NAFSA understood it, J program sponsors were required to report an exchange visitor's participation within thirty days of the program start date. However, what should be done if the exchange visitor enters the country late, for example two months after the program start date? NAFSA requested the DOS to clarify in writing that "sponsors are required to report exchange visitor's participation within thirty days of the start date on the DS-2019; or, if the exchange visitor enters after the DS-2019 start date, the sponsor is required to report participation within thirty days of inspection at the POE."³³³ The INS responded by stating that if the EV arrives after the start date on the DS-2019, INS would most likely be given an I-515 upon admission. When an EVP knew or has reason to suspect that an exchange visitor would not arrive by the start date on the DS-2019, the EVP could go into SEVIS and amend the program start before the EV's initial entry. Ideally a new DS-2019 should be sent to the EV. This complicated response was confusing and confounding to the EV participating programs. Any good faith misunderstanding of such an unclear provision might result in the EV being declared out of status and rejected by DHS-INS officials at the POE.

6. *Problems with and Application of Regulations*

Schools were very much concerned with inconsistent interpretation

329. *Id.*

330. *Id.*

331. *Id.*

332. 8 C.F.R. § 248.3 (2006).

333. NGLU 2003-04-a, *supra* n. 224, at "12. OPT Adjudication & Status."

and differential application of SEVIS regulations. It became clear that different schools and government agencies interpreted SEVIS legal requirements differently. Furthermore, different officials within the same agency also had a different understanding of the rules and applied them differently. This resulted in conflicting guidance and contradictory instructions. The following examples illustrate the nature and magnitude of the problem.

(a) *DHS v. DOS*

Conflicts sometimes arose between federal regulations, SEVIS rules, and DOS policy. A relevant example is the conversion of status between professors and researchers. Federal regulations provided that change of status between professor and research scholars did not require approval of DOS.³³⁴ But the SEVIS rules did not allow for such a change of status without a formal request for change of category.³³⁵ DHS has taken the position that whether it was a change in category requiring approval was to be taken on a case by case basis that “may require an official request for change in category.”³³⁶ The schools who relied on federal regulations might find their visitors rejected by the SEVIS.

(b) *DHS v. Help Desk:*

What happens if a J-1 student came to the United States with a J-2 listed as a dependent, but the J-2 did not enter at the same time?³³⁷ However, upon the J-1’s entry, the J-2’s record was also automatically validated.³³⁸ The Help Desk said that canceling the J-2’s record pending his application for a visa, or if he already had a visa, his entry to the United States would suffice. Then re-adding them to the J-1’s record and re-issuing a DS-2019 when either of those situations occurred was acceptable.³³⁹ The DHS disagreed and wanted the J-2 visa kept current until the J-2 was ready to travel with the original DS 2019.³⁴⁰

Help Desk told schools that “if a pending OPT student’s case is not adjudicated within 60 days of program completion, the student would have to return home.”³⁴¹ However, DHS suggested that the student’s

334. NGLU 2003-11-b, *supra* n. 263, at “10. Changing from J Professor to J Research Scholar.”

335. *Id.*

336. *Id.*

337. NGLU 2003-10-a, *supra* n. 270, at “9. J-2 Visas and Validations.”

338. *Id.*

339. *Id.*

340. *Id.*

341. NGLU 2003-04-a, *supra* n. 224, at “12. OPT Adjudication & Status.”

status would not be automatically terminated even if OPT was not approved within 60 days, but instead he or she would be placed on an “alert” list.³⁴²

(c) *DHS v. schools*

A school raised the issue of whether an approved OPT student was considered to be engaging in another level of education when he took a supplementary course during his OPT employment.³⁴³ The rule was that students could take courses during their OPT employment provided that the classes were not in furtherance of a different educational aspiration, but were instead “incidental” to the students’ employment.³⁴⁴ DHS was of the opinion that the student could take an OPT related course if it was required by OPT employment.³⁴⁵ However, NAFSA wanted reassurance that the DHS interpretation was given to other administrators, such as the “DHS Service Centers, district offices, enforcement units, and ports of entry, to ensure consistency of interpretation.”³⁴⁶

Regulations for F SEVIS required that schools request OPT training before the student finished their studies.³⁴⁷ Some Service Centers denied paperwork received after the students completed their studies, but NAFSA contended that the regulation could be interpreted to provide that the important date is the one on which DSO approval is given for an OPT training request in SEVIS instead of when the Service Center received I-765 forms.³⁴⁸ However, the DHS insisted that the correct date was “before the student’s program end date.”³⁴⁹

(d) *School (DOS) v. Help Desk*

One typical problem was that the Help Desk would give out erroneous information based on SEVIS requirements or Help Desk working practices not conforming to the law. In one case, the Help Desk informed the schools that they must register F-1 students within thirty days of when the program started. In another case the Help Desk advised the school to change the program start day to correspond with registration day.

342. *Id.*

343. NGLU 2003-09-a, *supra* n. 267, at “2. OPT and incidental study.”

344. *Id.*

345. *Id.*

346. *Id.*

347. NGLU 2004-01-a, *supra* n. 262, at “5. CIS says OPT I-765 must be received on or before Program End Date.”

348. *Id.*

349. *Id.* (emphasis in original).

Additionally, many times DHS did not have a ready answer for questions and various situations. For example, a J-1 student was leaving the country and leaving a J-2 dependent behind with his spouse who was also a J-1. The DHS pled ignorance and stated that it would need to research the issue.³⁵⁰

7. Problems of Lack of Fit Between SEVIS Regulations and Technology

In many instances the SEVIS regulations did not match the technology operating requirements, or SEVIS technology did not otherwise support SEVIS laws and regulations. For instance, J-1 regulations called for the schools to “update the Exchange Visitor’s SEVIS record to reflect details of such [on campus] employment.”³⁵¹ However, the SEVIS software program has no such entry function.³⁵² Another problem occurred when SEVIS was originally programmed. The law provided for designations in length of one, two, or five years.³⁵³ However, new regulations published just before SEVIS went into service only provided for a two-year re-designation period for the sponsored program.³⁵⁴ The disparity created confusion and was never satisfactorily resolved.

Thirdly, NAFSA informed DHS on August 13, 2003 that the states of Serbia and Montenegro were not listed in the SEVIS country codes. DHS said they would update the list that day.³⁵⁵ But as of November, the country codes had not been included.³⁵⁶ Consequently, students from this country had a difficult time getting their applications processed.

Another problem occurred when the SEVIS program did not have an extension of stay for more than twelve months. Schools brought the issue up and expected changes to the SEVIS 4.8 version. DHS promised they would be open to discussion. However, they did not accept the proposed change or commit to a firm date.³⁵⁷

350. NGLU 2003-09-b, *supra* n. 264, at “4. How should an A/RO switch the dependents of J-1 parents?”

351. NAFSA: Assn. of Intl. Educators, *Summary: August 20, 2003 SEVIS Conference Call NAFSA, DHS, DOS, NGLU 2003-08-c*, “2. Authorizing On-Campus Employment for Exchange Visitors,” (Aug. 20, 2003) (copy on file with Author) (alterations in original).

352. *Id.*

353. NGLU 2003-09-b, *supra* n. 264, at “7. Redesignation alert for J exchange programs.”

354. *Id.*

355. NGLU 2003-11-b, *supra* n. 263, at “2. Serbia & Montenegro Still Not Listed in SEVIS Country Codes.”

356. *Id.*

357. *Id.* at “3. When Will F SEVIS Allow Extensions of Stay Over 12 Months?”

C. Varieties of Technical Problems

At the implementation stage, the schools faced a number of technical problems, some of which were unanticipated, but most of which could have been avoided through detailed planning and testing.

1. Problems with Lack of Technical Specifications

David Ward, President of the American Council on Education, on behalf of thirty-three higher education associations, urged the federal government to push for SEVIS implementation only when the technology was fully developed, tested, functional and reliable:

First, the specifications and the interface for batch processing must be finalized Second, the operating software for SEVIS must be made available for purchase, installation, and testing by *all* institutions in advance of the compliance deadline, including the technical assistance and training in the use of the software that vendors will provide Third, adequate technical training and infrastructure at INS is necessary to ensure that the SEVIS web site is fully interactive for campuses before SEVIS can be said to have gone "live."³⁵⁸

Many problems and issues confronted by the schools, especially in the early SEVIS implementation stages, resulted from the schools inadequate technological capacity (hardware, software, or human resources) to interface with SEVIS. INS promised, but never released technical specifications for SEVIS until it was too late for them to be implemented. Therefore, schools wishing to develop their own software were not able to do so. A school wanting to buy software in the market discovered that such software was not available because software vendors were not provided with technical details to develop SEVIS compatible software.³⁵⁹

2. Problems with Incompatibility Between Systems

Many of the interface problems were caused by the INS imposing standards and requirements that deviated from common accepted industrial standards. In so doing, the universities were forced to adjust their industrial standards to SEVIS protocol at substantial cost and delay

358. Ltr., *supra* n. 83. "The proposed compliance deadline of January 30, 2003 is unlikely to prove workable, a view shared by the Department of Justice's Office of the Inspector General (OIG). We believe a compliance deadline should be set 180 days *after* the Inspector General certifies that SEVIS is fully operational and software is available for purchase." *Id.* ACE recommended that SEVIS compliance deadline be set at 180 days after "Inspector General certifies that SEVIS is fully operational and software is available for purchase." *Id.*

359. *Id.*

to the universities.³⁶⁰ The challenge was to create different proprietary and independent data systems that had common data models, (“consolidated business logic”)³⁶¹ and separate functional processes that communicated with one another. The question that remained was how the federal SEVIS system could interact freely and securely with local university systems, particularly when the universities and the federal government refused to give up their own authority to define and control the information protocol and process.

3. Problems with Structural Difficulties and System Deficiencies

Structural difficulties that stood in the way of successful interfacing between universities and SEVIS could be categorized as system deficiencies, (2) information deficiencies, and (3) policy deficiencies. These deficiencies are not exhaustive but represent some of the more egregious, recurring, and structural technological lapses to the existing information gathering system and process which promised to hamper the successful launch and effective operations of SEVIS.

(a) System deficiencies

The existing university information technology (IT) structure and data collection processes were not designed to serve SEVIS needs. Foreign student information collection has not traditionally been clearly defined on paper, well organized within a department, seamlessly coordinated between business units, or tightly centralized within a university. Many universities have a lack of connectivity between international student offices and other academic departments and administrative offices. For example, if a student is put on academic hold for poor performance or criminal misconduct, such information would usually not be shared with other academic departments and business units. Therefore, the international student office would be excluded. Failure to share information stems from privacy concerns and jurisdictional habits. Thus, if the student chooses not to challenge the academic hold and instead ratifies the problem the international student office will generally not be informed. Even if the international student office received these types of reports, it would be incredibly difficult and time consuming to verify the validity of each of the events to determine whether the information is sufficient to justify reporting it to SEVIS.

360. *Id.*

361. *Id.*

(b) Information deficiencies

In addition to system deficiencies stemming from common practices and operations of a university are informational deficiencies concerning the data that universities presently collect and whether that information is sufficient for SEVIS compliance. Although the final list of SEVIS data elements required by the university's submission remains unknown, existing information systems and databases in most international student offices across the nation are not able to capture all required data elements to fully comply with SEVIS. In order to capture all the information required, the university may come into conflict with various federal, state, and local government's laws, rules, and regulations.

(c) Policy deficiencies

There was no uniform and university-wide policy governing the collection and processing of SEVIS-related information. As a result, many international student offices and other universities and business units were left to their own devices. Correlating information between the departments was often difficult, and one department may not comply with SEVIS as well as another. In addition, there was no policy or procedure governing when or how to perform compliance audits and data integrity audits sufficient to assure that the data collected was valid and reliable.

4. Problems with Lack of Technical Assistance

Throughout the SEVIS implementation period from 2001 to 2003, NAFSA members repeatedly complained of lengthy hold-times when seeking assistance from the Help Desks. For the month of March 2003, Help Desks nation wide were working on eight hundred calls per day.³⁶²

Discrepancies between the various company and administrative records for hold-times varied. For the month of August in 2003, the Help Desk's record showed that the average hold-time was just under two minutes, but that some calls held for as long as twelve minutes.³⁶³ EDS showed that the hold time was about five minutes while NAFSA had reports of a much longer holding pattern.³⁶⁴

As for the data fixes, DHS reported that a total of 3,700 data fix tickets were received over a three month interval.³⁶⁵ The data fixes may

362. NGLU 2003-09-b, *supra* n. 264, at "2. Help Desk hold times and statistics."

363. *Id.*

364. NGLU 2003-03-26, *supra* n. 224, at "Help Desk Statistics."

365. NGLU 2003-09-b, *supra* n. 264, at "2. Help Desk hold times and statistics."

have included fixes for complex problems and issues involving multiple students.³⁶⁶ DHS promised to assist the Help Desk in reducing the workload by “correlating all of the necessary work-arounds,” while asking that NAFSA members take more care so there would be fewer requests for data fixes.³⁶⁷

The NAFSA members reported negative encounters in trying to communicate with DHS.³⁶⁸ They found that DHS district level student/school officers were often not well-trained to deal with SEVIS technical details nor adequately informed as to the latest developments in procedures and practices.³⁶⁹ They also received confusing and conflicting opinions from different agencies and officials.³⁷⁰ As a result, many school officials had little faith in DHS in helping with their inquiry or addressing their concerns.³⁷¹

5. *Problems with System (Zero) Tolerance*

SEVIS is designed to have zero tolerance for mistakes, which means that once a mistake is made the schools cannot correct it, but instead must ask the Service Center or Help Desks for a data fix ticket. DHS and schools resorted to creative ways to “work around” the problem, which was frequently and routinely done. However, a “work around” might cause unintended and larger problems down the road.³⁷² For example, in dealing with erroneous transfer entries, the Help Desk recommended two ways to bypass the system and avoid data fix.³⁷³ The transfer-out school may either write a letter requesting a transfer or the transfer-in school can create a record for a student and then transfer it back.³⁷⁴ DHS did not have a problem with either of these options.³⁷⁵ However, SEVIS was not designed for multiple records and files pertaining to an individual student enrolled in the United States.

366. *Id.*

367. *Id.*

368. See e.g. NGLU 2003-12-a, *supra* n. 75, at “11. SEVIS ICE Communication with CIS Student/School Officers” (discussing problems with communication).

369. See *id.* (questioning the current practices regarding information and “timely updates”).

370. See *supra* § VI(B)(6) (detailing an example of conflicting instructions).

371. See NGLU 2003-12-a, *supra* n. 75, at “11. SEVIS ICE communication with CIS Student/School Officers” (discussing communication issues).

372. NGLU 2003-09-c, *supra* n. 269, at “6. SEVIS Work Arounnds” (e.g. SEVIS does not allow for extension of more than one year or 5 years and no data entry from POE).

373. NGLU 2003-10-a, *supra* n. 270, at “8. Transfers and Data Fixes for Transfers.”

374. *Id.*

375. *Id.*

6. *Problems with Program Inflexibility*

SEVIS would not make allowance even when there was a mistake on the part of the system administration, and schools were not allowed to make exceptions to SEVIS rules. This included cases when the system was found to be dysfunctional and the process was flawed. In many cases, a student who intended to enter a new program after he finished an old one would not be able to do so until he obtained an I-20. This sometimes did not allow the transfer school enough time to complete the I-20 form and send it back to the transfer student.

There were other cases of inflexibility which negatively impacted the schools and frustrated the students. For example, SEVIS did not allow for "reverse matriculation,"³⁷⁶ SEVIS instead only allowed matriculation for ascending degrees, such as Bachelors to Masters, etc., which would not allow for a student initially beginning a Ph.D. to receive a Masters degree at the end of their program.³⁷⁷ The response was that DOS did not anticipate this type of scenario.³⁷⁸

7. *Problems with Delay in Fixing Problems*

There was often a substantial delay in fixing problems due to enormous work loads and limited resources.³⁷⁹ For instance, a DSO reported that he made a mistake of authorizing an OPT for student one in the name of student two, with a name identical to student two's name but with a different SEVIS number.³⁸⁰ The Texas Service Center corrected the record and student one was afforded a correct OPT.³⁸¹ Student two, however, could not get an OPT recommendation because there was already an OPT recommendation on the record from the earlier mistake.³⁸² The Help Desk was called and they promised a fix within twenty-four hours, but failed to do so.³⁸³

376. NAFSA: Assn. of Intl. Educators, *SEVIS Conference Call: NAFSA, DHS, ICE, DOS, EDS, CA, ASSET, CSJET, AASCU*, NGLU 2003-10-d, "1. DOS to review 'Reverse Matriculation' Scenario" (Oct. 29, 2003) (copy on file with author).

377. *Id.*

378. *Id.*

379. NGLU 2003-06-a, *supra* n. 224, at "3. Resoultion of User Problems" (NAFSA was concerned with substantial delay before a problem was fixed and the impacts on schools and students); *see also* NGLU 2003-11-b, *supra* n. 263, at "4. Help Desk Statistics on Data Fixes and Help Desk Calls" (the Help Desk usually receives over 11,000 calls a month); NGLU 2003-10-a, *supra* n. 270, at "7. OPT Errors" (delay in fix because of the quantity of tickets the Help Desk receives).

380. NGLU 2003-10-a, *supra* n. 270, at "7. OPT Errors."

381. *Id.*

382. *Id.*

383. *Id.*

8. *Problems with Lack of Accommodation for Unconventional Programs*

SEVIS was not designed to accommodate unconventional programs such as distant learning with occasional onsite visits, short intensive English training courses, or intensive weekend MBA courses. SEVIS required students who took more than eighteen hours a week of instruction to apply for an F-1 visa subject to repeated, steep SEVIS fees and lengthy interviews.³⁸⁴ Consulates have been giving B-1 visa when students asked for F-1 as a “work around” to avoid the problem.³⁸⁵ DHS insisted that giving the correct visa for the circumstances was the proper course of action.³⁸⁶

9. *Problems with Less than Appreciation for Educational Practices*

SEVIS was also ill-suited to accommodate educational mishaps and disciplinary actions. NAFSA raised a question about how to process student suspension, termination and reinstatement cases,³⁸⁷ which adversely affected students’ visa status. The DHS recommended that disciplinary actions should not be recorded until an appeal from the action is final.³⁸⁸ If the discipline is recorded, however, the DSO should get a data fix for the record.³⁸⁹

10. *Problems with Breach of Confidentiality*

There were a few reports of “breaches of confidentiality.”³⁹⁰ However, the likelihood that these breaches would occur was 1 in 40,000 system transactions.³⁹¹ DHS realized this was not permissible, and a system solution to this problem has been implemented.³⁹² Since that time there have been no data crossover problems.³⁹³

384. NGLU 2003-10-b, *supra* n. 273, at “7. Short Academic Programs.”

385. *Id.*

386. *Id.*

387. *Id.* at “6. Suspensions, Terminations, and Reversals of Academic Decisions.”

388. *Id.*

389. *Id.*

390. Asa Hutchinson, Under Sec., Border & Transp. Sec., Dept. of Homeland Sec., *The Conflict Between Science and Security in Visa Policy: Status and Next Steps: Hearing Before the Science Committee House of Representatives*, <http://www.house.gov/science/hearings/full04/feb25/hutchin.htm> (Feb. 25, 2004). ???

391. *Id.*

392. *Id.*

393. *Id.*

11. Problems with Trial and Error

The SEVIS system was very much a work-in-progress project for the schools as well as DHS. As end users, the school officers often had to confront problems and deal with issues that were not anticipated or provided for. In such cases, the school officials consulted the Help Desk on a case by case basis while NAFSA met in conferences with DHS to resolve the difficulties. However, the Help Desk usually could not solve the problems and had to refer them to DHS, which would then have to conduct an investigation and research before an answer was available. This often resulted in long delays and great anxiety for the students and visitors.

VII. CONCLUSION: TAKING STOCK

*“When the plan meets reality, reality always wins”*³⁹⁴

A. Introduction

Everyday SEVIS grows stronger, and more mature. Many predicted that it would fail to materialize, but it miraculously survived. Whatever has transpired, SEVIS will be recorded as the first ever electronic foreign students and visitor tracking system in United States history. Now that it is in place, it is time to take stock.

B. What Has Been Achieved?

While SEVIS has been declared a total success by the Bush administration and its utilities demonstrated in many instances with end users, its process of implementation is an unmitigated failure, reflecting poorly on the Bush administration in leading, planning and executing nation-wide security programs.

The DHS-ICE reported the following achievements.³⁹⁵ SEVIS, administered by two agencies, the Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP), has kept the United States safe by tracking foreign exchange students and others who wanted to study in the country.³⁹⁶ Two agencies, the ICE and CBP administer the program.³⁹⁷ As of July 2004, it reported certifying

394. U. Cal. Berkeley, *SEVIS @ Berkeley Home Page*, <http://web.archive.org/web/20031221213424/www.ias.berkeley.edu/siss/hurricane/> (accessed Dec. 21, 2003).

395. U.S. Immig. and Cust. Enforcement, *Fact Sheet, SEVIS: One Year of Success*, http://www.ice.gov/graphics/news/factsheets/sevis_1year_success.htm (Aug. 3, 2004).

396. *Id.*

397. *Id.*

8,737 schools and exchange visitor programs, approving 770,000 students and exchange visitors (F-1, M-1, and J-1 visa categories), and maintaining data on more than 100,000 visitors' and students' dependents.³⁹⁸ In terms of enforcement, SEVIS referred 36,600 potential student violators to the ICE Compliance Enforcement Unit (CEU) for investigation, of which 2,900 were “no-shows,” and “expulsion, suspension, and failure to maintain a full course of study.”³⁹⁹ As a result 1,591 were referred for more investigation, resulting in 155 arrests.⁴⁰⁰ Under “Enforcement Successes” it reported three sets of cases.⁴⁰¹ The first case involved a student and an exchange visitor who were investigated for fraudulently applying for “SEVIS certification for schools that were already SEVIS-certified.”⁴⁰² There were also several cases of corrupt school officials who sold fraudulent I-20 forms and fake transcripts.⁴⁰³ The last case involved a complaint in which a student, supposedly from Nigeria, tried to get duplicate approval of a school, which would give access to not only a user ID and password, but also the ability to create fake Forms I-20.⁴⁰⁴

C. *What Have We Learned?*

SEVIS, as designed and now implemented, is far from perfect and leaves much to be desired. As it relates to policy, SEVIS has centralized the control of foreign students and visitors in the hands of DHS, putting security considerations over and above university administrative concerns and international students educational needs. At an operational level, it was found that SEVIS was a learn-as-you-go, trial-and-error project, with many managerial, technical and legal problems that remain unresolved and more problems that are waiting to be discovered.

The DHS forged ahead with the implementation of SEVIS, against arbitrary “imposed” deadlines and without due considerations for the problems it might pose for the schools and the hardships it certainly would inflict on the students. It failed to be successful on at least two counts: universities were frustrated and students were anxious. With days to go before final implementation, schools were not certified, regulations were not promulgated, training was not provided, and program codes were not released. During implementation, SEVIS was not accessible,

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.* at “Enforcement Successes.”

402. *Id.*

403. *Id.*

404. *Id.*

files were misplaced, Help Desks were unhelpful, inquiries were not responded to, data fixes were long delayed, and more.

The high-handed manner in which the SEVIS system was imposed on the universities—from lack of consultation to unfunded mandate—spoiled the delicate working relationship between the universities and the government, making future cooperation difficult, if not impossible.

Finally, the rush to put SEVIS in place without due consideration of the universities' educational philosophy and foreign students' welfare has eroded the hard-earned status and leadership of United States higher education systems throughout the world. Increasingly, foreign students are staying away instead of yearning to come to United States to study, to learn, and to exchange experiences and ideas.